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Joinder and Severance in Federal Criminal Cases: An Examination of Judicial Interpretation of the Federal Rules

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I. Introduction

A basic understanding of the law regarding joinder and severance is essential for any lawyer practicing in the federal criminal courts. Whether a defendant is tried singly or jointly with co-defendants can play a vital role in whether that defendant is convicted or acquitted. Likewise, an acquittal may turn upon whether or not a defendant is tried for one offense at a time or for multiple offenses jointly. The purpose of this study is to explore the intricacies of the federal rules relating to joinder and severance in the context of criminal cases: Federal Rules of Criminal Procedure 8, 13, and 14. Although each of these rules is concerned with a different aspect of joinder and severance, they are interrelated. Notwithstanding the fact that these various rules appear fairly straightforward, federal appellate court decisions have interpreted them in such a way as to delineate, expand and limit their scope. As a result, it is imperative for the practicing attorney to refer to those decisions as supplementing the specific requirements of the federal rules.

Particular emphasis will be paid to the law of the Seventh Circuit. However, in several specific areas of this subject, other circuits have been recognized as providing authoritative interpretations of the rules. In such areas, those circuits will be accentuated. Furthermore, the subject of joinder and severance is one in which federal appellate courts appear to enjoy borrowing of precedent from other circuits; therefore, a general familiarity with the law of all circuits is particularly vital in this area and, accordingly, such coverage will be attempted.

II. Rule 8—Joinder

A. *Joinder of Offenses Under Rule 8(a)*

Multiple offenses may be joined together for trial purposes regardless of their nature, i.e., they may be all felonies or misdemeanors or any combination of the two. Rule 8(a)[1] permits, but does not mandate, joinder in a single charging instrument of two or more offenses in separate counts so long as the offenses charged meet at least one of three tests.

1. Same or Similar Character Test

The first such test is that the offenses joined be of the same or similar character. Hence, it has been held to be permissible for the government to join in a single indictment two separate charges of bank robbery which were allegedly committed six days apart, regardless of the fact that different banks were robbed in each instance.[2] Joinder is justified in these circumstances on the ground that

1 Rule 8(a) provides that: (t)wo or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
FED. R. CRIM. P. 8(a).

2 United States v. Di Giovanni, 544 F.2d 642 (2d Cir. 1976).

the modus operandi employed in the commission of each bank robbery was the same.[3] Similarly, the Fourth Circuit in *United States v. Foutz*[4] found the "same or similar character" test satisfied when it upheld joinder of two separate bank robberies committed two and a half months apart.[5] And, in *Johnson v. United States,*[6] the Eighth Circuit affirmed joinder of five separate violations of the Mann Act,[7] explaining that ". . . joinder of offenses is ordinarily appropriate where, as here, the specific counts refer to the same type of offenses, occurring over a relatively short period of time and the evidence as to each count of necessity overlaps."[8]

On the other hand, misjoinder was found to have occurred in *United States v. Graci,*[9] where the Third Circuit held that joinder of two counts in regard to the sale of stolen government drugs with another count charging delivery of different drugs over two years later was improper. The court commented that since the latter count did not involve drugs owned by the government, it was clear that the offenses were not of the same or similar character.[10]

The Seventh Circuit in *United States v. Quinn*[11] failed to find the "same or similar character" test met, when the government joined in a single indictment four counts concerning two transactions conducted three months apart. The first two counts, relating to the first transaction, alleged that the defendant, a director of a federally insured savings and loan association, misapplied the association's funds with intent to defraud when he obtained a rent prepayment from the association for his private business concern. The final two counts related to his having presented a check drawn on his private business concern in exchange for an accommodation check drawn on the savings and loan association, with knowledge that the check he presented was not covered by sufficient funds. Although both transactions involved the misapplication by the director of funds to his private business concern, and thus his personal use, the court found that the "same or similar character" test was lacking without further explaining its rationale. Unfortunately, many of the judicial dispositions of allegations of improper offense joinder fail, as in *Quinn,* to provide criteria which would provide guidance as to the precise scope of this rule.

2. Same Act or Transaction Test

The second alternate test for joinder of offenses is whether the charges are "based on the same act or transaction." Thus, for example, the court in *Quinn*

3 *Id.* at 644.
4 United States v. Foutz, 540 F.2d 733 (4th Cir. 1976).
5 *But see* the discussion of *Foutz, infra* at 736-39, where the *Foutz* court went on to find Rule 14 required severance at a new trial.
See also Dunaway v. United States, 205 F.2d 23 (D.C. Cir. 1953), where the court found three counts of housebreaking, each committed on a separate house on a different date all within a two month period, properly joined under Rule 8(a).
6 356 F.2d 680 (8th Cir.), *cert. denied,* 385 U.S. 857 (1966).
7 The Mann Act prohibits transporting women across state lines for the purposes of prostitution. 18 U.S.C. § 2421 *et. seq.*
8 356 F.2d at 682.
9 504 F.2d 411 (3d Cir. 1974).
10 *Id.* at 412.
11 365 F.2d 256 (7th Cir. 1966).

determined this second standard had not been met either, given its conclusion that the two occurrences in question were wholly separate acts and transactions.

In order to satisfy this alternative test for joinder, it is merely necessary that the offenses joined in some way arise out of "the same sequence of events."[12] This standard seems to be interpreted rather broadly, as is evidenced by examination of the Fifth Circuit decision in *United States v. Park,*[13] wherein the court considered the "same act or transaction" test against an appellant's urging that the offense of manufacture of a controlled substance was misjoined with a gun charge. Apparently both the drugs and the gun had been uncovered during a search of appellant's residence, which the appellant alleged provided "an insufficient nexus to say that the charges arose from the same transaction."[14] In upholding the trial court's finding of proper offense joinder, the court relied on *United States v. Pietras,*[15] a case which involved joinder of the offense of possession of an unregistered firearm with charges of bank robbery and kidnapping. The firearm had not been used in connection with the bank hold-up or the kidnapping. Rather, the gun had merely been found in the van which Pietras had used as a means of escape during the robbery. The *Pietras* court explained that "[t]here is no prerequisite to joinder that the firearm be used in the commission of the robbery."[16] It seems clear in cases involving gun charges, that when the firearm is uncovered in any way as a result of a separate offense, a connection between the offenses sufficient to justify their joinder will be found.

The *Park* court, in reaching its conclusion, undertook to define "transaction" as

> "a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship." *Moore v. New York Cotton Exchange,* 1926, 270 U.S. 593, 610, 46 S. Ct. 367, 371, 70 L. Ed. 750, 757; *accord, United States v. Friedman, supra,* 445 F.2d at 1083; *Cataneo v. United States,* 4 Cir. 1948, 167 F.2d 820, 823; *United States v. Mikelberg,* 5 Cir. 1975, 517 F.2d 246, *cert. denied,* 424 U.S. 909 (1976).[17]

The court added:

> In *Cataneo v. United States, supra,* the court in construing the word "transaction" as used in Rule 8 stated that it "involves the balancing of conflicting interests: (1) speed, efficiency, and convenience in the functioning of the federal judicial machinery; against (2) the right of the accused to a fair trial, without any substantial prejudice to that right occasioned by the joinder of offenses and/or defendants." (citations omitted)[18]

12 United States v. Abshire, 471 F.2d 116, 118 (5th Cir. 1972), affirming joinder of the offense of transporting a stolen motor vehicle with the charge of transportation of a firearm by a felon.

13 531 F.2d 754 (5th Cir. 1976).

14 *Id.* at 761.

15 501 F.2d 182 (8th Cir.), *cert. denied,* 419 U.S. 1071 (1974).

16 531 F.2d at 761 (citing *Pretras,* 501 F.2d at 185).

17 *Id. See also* United States v. Isaacs, 493 F.2d 1124 (7th Cir. 1974), *cert. denied,* 417 U.S. 976, for nearly identical language.

18 531 F.2d at 761.

3. Two or More Acts or Transactions Connected Together or Constituting Parts of a Common Scheme or Plan

The third test for Rule 8(a) joinder arises when more than a single act or transaction is found to have occurred. In such instances, joinder may be justified if the several acts or transactions are determined to be somehow "connected together or constituting parts of a common scheme or plan."[19]

A typical case of "common scheme or plan" joinder was presented to the United States Supreme Court in 1894 in *Pointer v. United States.*[20] The defendant had been accused of the murders of two men, one immediately preceding the other. The Court, in upholding the joinder, remarked that "[t]here was such close connection between the two killings, in respect of time, place and occasion, that it was difficult, if not impossible, to separate the proof of one charge from the proof of the other."[21] Another example of such joinder is found in *United States v. Barrett,*[22] where the defendant's motion to sever mail fraud charges from bribery and tax evasion charges had been denied by the trial court. On appeal, the Seventh Circuit found that, since all offenses were connected with the defendant's use of his public office for personal gain, the "common scheme or plan" requirement was met, and the separate acts were properly joined. In another Seventh Circuit opinion, *United States v. Isaacs,*[23] appellant and ex-governor, Otto Kerner, had objected to the joinder of a perjury count with various substantive counts involving race track stock fraud. The court, in rejecting this view, reasoned that all the offenses were logically related to one another. "They are all connected with, or arose out of, a common plan to corruptly influence the regulation of horse racing. The perjury charge against Kerner related to his involvement with the racing industry, and evidence of that involvement was pertinent to the proof of the other offenses."[24]

In some cases, the courts seem to allow offense joinder under this test if they merely uncover between the separately committed offenses some common basis in terms of *time* of the commission of the offenses or in terms of *motive* behind the wrongdoings. An example of the former is *United States v. Jines*[25] wherein joinder of separate transactions was upheld by the Eighth Circuit where the defendant was appealing his conviction for *possession* of an unregistered firearm and *distribution* of heroin on the ground of misjoinder under Rule 8(a). The court, however, noted that "[b]oth offenses involved the sale of contraband and they were committed on the same day. The [same] two detectives observed both transactions. Thus the proof of the offenses was overlapping to some extent."[26] An illustration of the latter approach is *United States v. Gorham,*[27]

19 FED. R. CRIM. P. 8(a).
20 151 U.S. 396 (1894). *Pointer,* a pre-Rules decision, has been nonetheless relied on by a number of courts in upholding joinder under the federal rules.
21 *Id.* at 404.
22 505 F.2d 1091 (7th Cir.), *cert. denied,* 421 U.S. 964 (1975).
23 493 F.2d 1124 (7th Cir.), *cert. denied,* 417 U.S. 976 (1974).
24 *Id.* at 1159.
25 536 F.2d 1255 (8th Cir. 1976).
26 *Id.* at 1257.
27 523 F.2d 1088 (D.C. Cir. 1975).

in which the D. C. Court of Appeals rejected the appellants' argument that joinder of two separate escape offenses was improper because the two escapes were "disparate offenses."[28] Instead, the court found the two escapes sufficiently related to come within the ambit of Rule 8(a), since the jury had found that the appellants were engaged in a conspiracy to escape. Moreover, the two offenses "arose out of a continuing state of affairs, i.e., appellants' dissatisfaction with their confinement in jail and their strong desire to escape. . . ."[29]

Sometimes it appears any type of "relationship" between the offenses will satisfy this standard. In *United States v. Quinones*,[30] the defendant was appealing from a conviction on charges of entering military property with an unlawful purpose, rape, and assault with a dangerous weapon, all stemming from events which transpired on a single evening, as well as a charge of escape from custody pursuant to an arrest several days after the assault and rape. The defendant contended that the trial court erred in joining the escape count with the prior three charges. What is interesting about this case is that defendant's arrest was pursuant to a wholly different incident for which he was wanted, but which charge was subsequently dismissed. Nevertheless, the court found that the arrest "warrant's execution, hence defendant's custody, was a direct result of the happenings charged in the other counts for which he was tried. Thus, they may be deemed 'connected together,' . . . and joinder was proper."[31]

In contrast, the joinder of offenses in *United States v. Quinn*[32] was found violative of Rule 8(a) joinder under the "common scheme or plan" test. There, the Seventh Circuit found that allegations of the misapplication of a savings and loan association's funds with intent to defraud, which occurred on two separate occasions three months apart, were separate transactions "not connected as part of a common scheme"[33] and therefore misjoined. Here it appears the time differential was critical.

In *Baker v. United States*,[34] the court was presented with one of the more complex situations of offense joinder. The indictment contained nine counts, four of which were properly joined as similar offenses in that each charged tax evasion. The remaining five were theft charges which were likewise properly joined among themselves. Four of the theft charges were determined properly joined with one of the tax evasion counts, on the ground that the tax evasion count arose from the fact that the defendant had failed to report on his tax return the stolen cash. The question presented to the court, however, was whether all nine counts were properly joined, when various groupings of the nine counts could satisfy any one of the tests for joinder, but all nine, when considered as a whole, could not. The court concluded that proper joinder of each count to every other was necessary; and, as a result, the union of all nine counts

28 *Id.* at 1093.
29 *Id.* at 1094.
30 516 F.2d 1309 (1st Cir.), *cert. denied*, 423 U.S. 852 (1975).
31 *Id.* at 1312.
32 365 F.2d 256 (7th Cir. 1966).
33 *Id.* at 264.
34 401 F.2d 958 (D.C. Cir. 1968), *cert. denied*, 400 U.S. 965 (1970).

constituted misjoinder.[35] Thus, a nexus between *each* offense, even if weak, must exist.

In sum, the three tests for offense joinder may be illustrated by the following: Under the "same or similar character" test for offense joinder, it would be permissible to charge a single defendant in the same indictment with both conspiracy to rob Bank X in Chicago *and* with robbery of Bank Y in Chicago in violation of federal law even though the offenses are unrelated except in character.[36] Under the "same act or transaction" test, it would be permissible to join for trial purposes the substantive offense of robbing Bank X in violation of federal law and conspiracy to rob that bank. Under the "two or more acts or transactions connected together or constituting parts of a common scheme or plan" test of Rule 8(a), if the defendant allegedly committed the substantive offense of robbing Bank Y, conspiracy to rob that bank, *and* kidnapping of Bank Y's guard (for hostage purposes) all in violation of federal law, the three charges would be appropriately joined in a single indictment. Finally, if in a subsequent search and seizure in furtherance of the robbery and kidnapping investigation, an unregistered firearm were discovered, the offense of possession of that gun could be properly joined for trial with the bank robbery, conspiracy and kidnapping charges.

B. *Joinder of Defendants Under Rule 8(b)*

Joinder of charges against multiple defendants is controlled by Rule 8(b),[37] not Rule 8(a).[38] Nevertheless, the two subdivisions of Rule 8 are alike with one important exception. Whereas Rule 8(a) employs a test which may be satisfied in one of three ways, Rule 8(b) acts as a limitation on the joinder of offenses when more than one defendant is charged, and instead looks to a test which may be satisfied in only two ways.

The major distinction between the two sections is that, unlike Rule 8(a), joinder of offenses which are of the same or similar character is clearly impermissible under Rule 8(b), whenever defendants are joined as well. In *United States v. Marionneaux*,[39] two counts in an indictment were joined in contravention of this principle. In reversing the trial court, the Fifth Circuit decreed the standard for joinder when there exist both multiple offenses and offenders.

> Although Counts I and II of the indictment under scrutiny charge offenses of the "same or similar character," which might be joinable under subsection (a), the identity or similarity of the character of offenses is not a permissible

35 *But see* notes 109-29 *infra* and accompanying text regarding the court's determination that the effect of that misjoinder was harmless error.

36 *See, e.g.*, United States v. Foutz, 540 F.2d 733.

37 Rule 8(b) provides:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

FED. R. CRIM. P. 8(b).

38 United States v. Roselli, 432 F.2d 879, 898 (9th Cir. 1970).

39 514 F.2d 1244 (5th Cir. 1975).

> basis for the joinder of defendants under subsection (b). To be joined as defendants in the same indictment under Rule 8(b), [each accused] must be alleged to have participated (1) in the same act or transaction or (2) in the same series of acts or transactions constituting an offense or offenses.[40]

In accord with this proposition is *United States v. Whitehead*,[41] in which the trial court was found to have applied an incorrect standard when it permitted the joinder of two defendants on the basis that the charges contained in the indictment were of a similar character. Both defendants were alleged to have sold cocaine to the same buyer thirteen days apart. Finding the offenses wholly "independent crimes, engaged in separately, without concert of purpose,"[42] the appellate court reversed defendant's conviction.

Although the "same or similar character" test is inapposite in regard to the question of the joinder of defendants, the two latter tests of Rule 8(a) offense joinder are clearly applicable to Rule 8(b) joinder, which is concerned with the joinder of defendants in a single charging instrument. As articulated by the Ninth Circuit in *United States v. Roselli*,[43]

> [i]t is irrelevant that Rule 8(a) permits charges "of the same or similar character" to be joined against a single defendant, even though they do not arise out of the same or connected transactions. Charges against multiple defendants may not be joined merely because they are similar in character; . . . and even dissimilar charges may be joined against multiple defendants if they arise out of the same series of transactions constituting an offense or offenses. . . . Except for this difference, the test for joinder under the two provisions is the same. 8 MOORE'S FEDERAL PRACTICE 8-23, 8-24.[44]

As a result of the similarity in language between Rule 8(b)'s dual provisions[45] and the "same act or transaction" and "two or more acts or transactions connected together or constituting parts of a common scheme or plan" tests of Rule 8(a), courts generally treat the standards as substantially the same for purposes of discussion. Exemplary of this tendency in regard to the latter two tests of Rule 8(a) is Judge Kerner's opinion for the Seventh Circuit, which appended Rule 8(a)'s "common scheme or plan" provision onto Rule 8(b)'s "same series of acts or transactions" test:

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40 *Id.* at 1248.
41 539 F.2d 1023 (4th Cir. 1976).
42 *Id.* at 1023.
43 432 F.2d 879 (9th Cir. 1970).
44 *Id.* at 898. *See also* United States v. Bova, 493 F.2d 33, 35 (5th Cir. 1974), for the proposition that "[W]hether there has been misjoinder in a trial involving multiple defendants is governed by Rule 8(b) only; Rule 8(a) has no application in such instances" (citing Cupo v. United States, 359 F.2d 990, 992 (D.C. Cir. 1966); King v. United States, 355 F.2d 700, 704 (1st Cir. 1966); WRIGHT, FEDERAL PRACTICE AND PROCEDURE, CRIMINAL § 144 (1969)).

Nevertheless, in cases involving both multiple defendants and multiple offenses, courts look to both rules, depending upon the nature of the appellant's claim. *See, e.g.*, United States v. Isaacs, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974), *United States v. Gorham*, 523 F.2d 1088 (D.C. Cir. 1975); United States v. Graci, 504 F.2d 411 (3d Cir. 1974); United States v. Amick, 439 F.2d 351 (7th Cir.), *cert. denied*, 403 U.S. 918 (1971); and United States v. Scott, 413 F.2d 932 (7th Cir. 1969), *cert. denied*, 396 U.S. 1006 (1970), where the courts inter-related discussions of Rule 8(b) with Rule 8(a).

45 As prerequisites to the joinder of multiple defendants Rule 8(b) requires that defendants be "alleged to have participated in the *same act or transaction* or *in the same series of acts or transactions constituting an offense or offenses.*" (emphasis added).

> The question then . . . is whether the defendants participated in the same series of transactions. The test of whether the acts of the defendants are part of a series of transactions depends on the *existence of a common p'an.* * * * [U]nder Rule 8(b) a conclusion that *acts were part of a common plan* should be based on such factors as whether the transactions have occurred in the same place, within a short period of time and using the same modus operandi.[46]

Inherent in Rule 8(b)'s restriction of joinder to defendants involved in (1) the same act of transaction *or* (2) the same series of acts or transactions is the principle that defendants charged with unrelated offenses may not be indicted and tried together. Rather, there must exist some link among *all* of the defendants before joinder is proper.[47] Consequently, in *United States v. Gougis,*[48] reversal of defendant's conviction was compelled on the ground that joinder of defendants was improper when no evidence connected defendant, Gougis, to certain counts involving only his co-defendants. The indictment at issue charged five separate offenses and three defendants with the sale, transportation and concealment of heroin. Appellant, Gougis, was charged in three of the five counts.[49] Because the remaining two counts were totally unrelated to Gougis and the offenses involved were not alleged to have been part of a "series" of transactions, the defendants were found by the Seventh Circuit to have been misjoined in violation of Rule 8(b).

In some cases, the requisite nexus for defendant joinder is established by demonstrating an evidentiary link between the offenses allegedly committed by the respective defendants. This occurred in *United States v. Gill.*[50] The indictment in *Gill* contained three counts, the first charging both Gill and his co-defendant, Fahey, with extortion, while counts II and III each charged Gill and Fahey individually with perjury before the grand jury which had investigated the joint extortion charge. The court acknowledged that "[w]ithout the nexus between the alleged extortion and the separate false declarations (the perjury charges), there would have been impermissible joinder under Rule 8(b). . . ."[51] Instead, the court found that the three counts were all part of the same transaction, as "[t]he same evidence adduced to prove the Government's charge under Count I was used to prove Counts II and III."[52]

The "same evidence" rationale was likewise utilized by the court in *United States v. Isaacs,*[53] in which the Seventh Circuit reasoned that joinder was proper since "[t]he evidence to establish the counts in question was pertinent to proof of other counts. . . ."[54] *Isaacs,* however, presented a more complex joinder problem. There, two defendants were faced with a nineteen count indictment charging

46 United States v. Scott, 413 F.2d 932, 935 (7th Cir. 1969), *cert. denied,* 396 U.S. 1006 (1970) (emphasis added).
47 *See* Ingram v. United States, 272 F.2d 567, 569, (4th Cir. 1959).
48 374 F.2d 758 (7th Cir. 1967).
49 Rule 8(b) permits that "[A]ll of the defendants need not be charged in each count" of the indictment. FED. R. CRIM. P. 8(b).
50 490 F.2d 233 (7th Cir. 1973), *cert. denied,* 417 U.S. 968 (1974).
51 *Id.* at 238.
52 *Id.*
53 493 F.2d 1124 (7th Cir.), *cert. denied,* 417 U.S. 976 (1974).
54 *Id.* at 1159.

conspiracy, mail fraud, bribery, perjury, the making of false statements to an I.R.S. agent and in their individual tax returns, and finally tax evasion. Thirteen of the counts charged both defendants jointly, four charged Kerner individually, and three charged Isaacs with separate offenses. On appeal, Isaacs contended that joinder of the counts charging Kerner separately for perjury and tax violations with the counts involving conspiracy, mail fraud and bribery was improper. In response, the court stated that, since the separate offenses charged against Kerner individually were generated by the underlying joint crime, the offenses may be deemed to have been committed as part of the "same series of acts or transactions" and thus properly joined under Rule 8(b).[55]

In reaching its conclusion in *Isaacs,* the court also relied in part on the reasoning of *United States v. Roselli*[56] and *United States v. Granello,*[57] both of which were concerned with the joinder of separate counts of income tax evasion against multiple defendants. The issue as to when individual income tax offenses (such as a single defendant's failure to report income on one's tax return) against separate defendants may be joined for trial turns on the nature of the underlying joint activity. *Roselli* and *Granello* suggest that before such offenses may be joined, some joint offense must be charged against both defendants. In general, the rule is that the individual income tax offenses against defendants may be joined for trial only when the joint activity in which the co-defendants were jointly engaged and from which the unreported income was generated, is in and of itself illegal. Thus, in *Roselli,* joinder was upheld when defendants' separate income tax violations were the result of joint gambling and racketeering operations, activities clearly illegal in themselves.[58] In contrast, joinder in *Granello* was found to be improper where two defendants failed to report on their individual tax returns income which had been earned from a joint business activity which was not *per se* illegal. Consequently, the separate tax violations could not have been construed to be part of the same act or "series of acts or transactions," since there existed no underlying offense to provide the nexus between the two defendants. Accordingly, this approach provides rather straightforward guidelines for joinder of defendants in tax evasion situations.

Individual offenses committed by different defendants are often joined by the inclusion of an allegation that the respective offenses were part of a single conspiracy. It must be pointed out that, although the government often utilizes the addition of a conspiracy count in order to facilitate the finding of a more concrete nexus among the joined defendants and their separate offenses, it is not necessary that defendants be charged with conspiracy to satisfy the joinder provisions of the federal rules.[59] Illustrative of the joinder of defendants with no conspiracy count is the case of *United States v. Scott,*[60] where a three count in-

55 *Id.*
56 432 F.2d 879 (9th Cir. 1970), *cert denied,* 401 U.S. 924 (1971).
57 365 F.2d 990 (2d Cir. 1966).
58 In accord is United States v. Beasley, 519 F.2d 233 (5th Cir. 1975), also involving the addition of an income tax offense against two of the four defendants. There, the underlying joint activity which generated the subsequent income tax violations was a conspiracy to distribute heroin.
59 United States v. Scott, 413 F.2d 932, 934 (7th Cir. 1969), *cert. denied,* 396 U.S. 1006 (1970).
60 *Id.*

dictment charged three defendants with secreting United States mail. Count I charged Scott alone; count II charged Scott and one other; and count III charged Scott and two others. Each count pertained to the secretion of mail upon a different date. Although not all defendants were charged in each count, and despite the fact that no conspiracy was alleged, Judge Kerner affirmed defendants' joinder as proper based upon evidence that the separate transactions were part of a common plan forming a sufficient connection among all the defendants. All three defendants were postal employees working at the same post office, and each instance of mail secretion involved the same modus operandi.

On the other hand, in *United States v. Whitehead,*[61] the court found that absent any evidence of a common scheme or plan between two defendants, each charged with the distribution of cocaine in a separate count, although the government had requested the court to infer the existence of a criminal relationship from the fact that both defendants resided in the same apartment building and had sold cocaine to the same buyer. In reversing the joinder, the court elaborated:

> The burden is on the government to show that persons to be joined participated in the same act or transactions, or in the same series of acts or transactions. Although there was a "series" of transactions involving a common denominator . . . , the government did not meet its burden of proving that there was any connection between appellant's offense and [his co-defendant's] offense. Carried to its logical conclusion, the government's theory might well allow us to join in a common indictment and trial two delinquent taxpayers who use the same accountant. Such a result approaches the ridiculous.[62]

C. *Special Problems Presented in Conspiracy Cases*

Often, the government will make use of an additional *count* charging conspiracy in an effort to facilitate a court's finding of a more concrete connection among joined defendants and their offenses. For example, in *United States v. Amick,*[63] joined in one indictment were forty-one counts, the last of which alleged a conspiracy by defendants to commit the forty various substantive offenses arising out of sales of common stock, thereby defrauding purchasers of a newly formed corporation. Appellants were eleven individuals as well as two corporations. The court had no difficulty in finding that the acts alleged in all forty-one counts constituted one series of acts or transactions for the purpose of Rule 8(b). In doing so, the court employed the 8(a) standard:

> All the substantive offenses were violations of the [same] securities act, involved the same security, and were alleged to have occurred during the duration of the alleged conspiracy. We have no doubt that at the least the acts and transactions upon which all 41 counts were based were "connected together or constituting part of a common scheme or plan."[64]

61 539 F.2d 1023 (4th Cir. 1976), *cert. denied,* 97 S. Ct. 1691 (1977).
62 *Id.* at 1025.
63 439 F.2d 351 (7th Cir.), *cert. denied,* 403 U.S. 918 (1971).
64 *Id.* at 360.

However, the simple inclusion of a conspiracy count is insufficient to provide the requisite connection when, in fact, the various joined counts are not based on two or more transactions which constitute parts of a common scheme or plan. Such was the conclusion of the court in *United States v. Spector*,[65] in which four defendants were charged in a nine count indictment with conspiracy and eight substantive offenses of making false statements to the Federal Housing Administration. Appellant Scott, however, was charged only with conspiracy. The conspiracy alleged in Count I had ended before the first substantive offense was alleged to have occurred. In support of his finding of misjoinder, Judge Swygert, speaking for the Seventh Circuit, reasoned that, since "[p]roof of the conspiracy would not cover the events relating to the [substantive charges] . . . similarly, and the proof of the substantive charges would not relate to the conspiracy,"[66] the acts alleged were not part of the same series of acts or transactions.

When defendants are properly charged with a single conspiracy, joinder is permissible based on the rationale that the defendants participated in the same series of acts or transactions constituting the offense or offenses, thus satisfying Rule 8(b)'s requirement.[67] However, when multiple conspiracies are charged or proven, the "same series of acts or transactions constituting the offense or offenses" test may or may not be satisfied, depending upon the facts of the case in question.

For example, in *United States v. Levine*,[68] "the government relies on . . . a ubiquitous conspiracy charge, to provide a common link between . . . otherwise unrelated transactions and to demonstrate the existence of a common scheme or plan among the several defendants."[69] In actuality, the Fifth Circuit Court of Appeals found, instead of one conspiracy as charged, two separate conspiracies involving different defendants at different times, yet with certain defendants common to both conspiracies.[70] Reasoning that the government had failed to establish "that a bridge sufficient to satisfy rule 8(b) joinder existed between the defendants . . .",[71] the court vacated appellants' convictions. The government had urged that, since the defendants were tied together on the *face of the pleadings*, the court was precluded from looking behind the indictment to determine whether or not Rule 8(b) had been fulfilled. The court disagreed, saying:

> [When] the defendant can show that the charge of a joinder of defendants in conspiratorial action is based on a legal interpretation that is improper, the court cannot base its 8(b) ruling on the written [indictment] alone but must determine if, under correct legal theory, joint action was actually involved.[72]

65 326 F.2d 345 (7th Cir. 1963).
66 *Id.* at 350.
67 *See, e.g.*, United States v. Johnston, 547 F.2d 282 (5th Cir. 1977).
68 546 F.2d 658 (5th Cir. 1977).
69 *Id.* at 662-63.
70 The indictment contained five counts, the first of which charged conspiracy, counts two and three charged four defendants with the interstate transportation of an obscene film by a common carrier and interstate transportation of an obscene film for sale and distribution. Counts four and five contained identical charges against two additional defendants not charged in counts three and four.
71 546 F.2d at 662.
72 *Id.* at 663.

The court added:

> The only real underpinning for the government's conspiracy count was the false legal premise that proof of proximate or simultaneous conspiracies with one common conspirator was sufficient to establish the existence of a single conspiracy.[73]

United States v. Marionneaux[74] involved a similar fact pattern. There, two conspiracies were charged, yet only one defendant was common to both counts. Although both conspiracies were, in part, schemes to prevent witnesses from testifying against Partin, the common co-conspirator, the court pointed out that "[a] 'series' of acts under Rule 8(b), F. R. Crim. P., is something more than 'similar acts.' "[75] In reversing defendants' convictions, the court held that "[w]here, as in the case *sub judice,* there is no substantial identity of facts or participants between the two offenses, there is no 'series' of acts under Rule 8(b)."[76]

On the other hand, joinder of separate conspiracies has been upheld when the two separate conspiracies are found to have been part of the "same series of acts or transactions" within the ambit of Rule 8(b). Such a situation was presented in *United States v. Crockett,*[77] where three defendants were charged with two conspiracies and one defendant was common to both. The first count charged Crockett and his son with conspiracy in the operation of an illegal gambling business, while the second charged Crocket and the local sheriff with conspiracy to obstruct the enforcement of gambling laws. The court explained that, because the two conspiracies were both related to the defendants' gambling operations, the "same series of acts or transactions" test of Rule 8(b) joinder was in fact met.

1. Variance of Proof

To be distinguished from the preceding cases is the variance of proof problem presented in *United States v. Varelli,*[78] where the government mischarges defendants (as a result of its failure to discern the sometimes subtle distinction between single and multiple conspiracies) with a single conspiracy, when in fact two or more conspiracies are thereafter proved to have existed.[79] To distinguish between a single conspiracy, where there must be a single design to accomplish a common purpose[80] and separate conspiracies, Judge Kerner set out a test, which subsequent courts have utilized:

> If there is one overall agreement among the various parties to perform different functions in order to carry out the objectives of the conspiracy, the agreement among all the parties constitutes a single conspiracy. However,

73 *Id.* at 665.
74 514 F.2d 1244 (5th Cir. 1975).
75 *Id.* at 1248 (citing King v. United States, 355 F.2d 700, 703 (1st Cir. 1966)).
76 *Id.* at 1249.
77 514 F.2d 64 (5th Cir. 1975).
78 407 F.2d 735 (7th Cir. 1969).
79 In *Crockett, Marionneaux,* and *Levine,* on the other hand, the defendants were charged with two conspiracies and two were proved.
80 407 F.2d at 741.

> where various defendants separately conspired with a common conspirator to obtain fraudulent loans from an agency of the United States, . . . there were several conspiracies since there was no overall goal or common purpose. *Kotteakos v. United States,* 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946).[81]

Cases such as *Varelli,* which involve variance between the pleadings and the proof present a joinder problem in one or two circumstances. First, if the two or more conspiracies which are determined to exist are not part of the "same series of acts or transactions," constituting part of a "common scheme or plan," then they are deemed to have been misjoined under Rule 8(b). Secondly, if multiple conspiracies exist, and the judge fails to properly caution the jury in regard to the admissibility of evidence against each defendant, then the defendants are likely to have suffered prejudice as a result of the jury's failure to keep the evidence separate and distinct as to each defendant.

Reversal in cases involving a variance between the number of conspiracies charged and the number subsequently proved is grounded in Rule 14, rather than Rule 8(b), on the basis that joinder was initially permissible as satisfying the "same series of acts or transactions" test, but that prejudice inhered in the absence of a sufficient cautionary instruction to the jury. In the absence of such an instruction, it is possible for the jury to transfer guilt across separate conspiracy lines. This, in *United States v. Johnson,*[82] reversal of the conspiracy conviction was mandated because of the possibility of prejudice when a *Varelli*-type variance occurred, and the trial court judge failed to give cautionary instructions to the jury.

On the other hand, although the court in *Varelli* holds that, whenever the *possibility* of variance appears, the court *should* instruct the jury in regard to multiple conspiracies,[83] prejudice does not automatically inhere in the absence of such instructions when in fact only a single conspiracy is supported by the evidence.[84] Of course, whenever the possibility of multiple conspiracies exists, the court leaves to the jury the decision as to whether the evidence demonstrated single or multiple conspiracies.[85]

2. Subsequent Dismissal of the Conspiracy Count

The propriety of joinder under Rule 8(b) is determined from a pre-trial perspective. The subsequent dismissal of a count on which joinder was predicated will not render the joinder invalid.[86] This principle is especially peculiar to joint defendants in conspiracy cases, where a conspiracy count which had justified the original joinder of defendants, fails for want of proof. The Supreme Court in *Schaffer v. United States,*[87] the leading case on this question, observed that once

81 *Id.* at 742.
82 515 F.2d 730 (7th Cir. 1975).
83 407 F.2d at 746.
84 United States v. Abraham, 541 F.2d 1234, 1238-39 (7th Cir. 1976).
85 United States v. Bastone, 526 F.2d 971 (7th Cir. 1975).
86 *See also* United States v. McDaniel, 538 F.2d 408, 414 (D.C. Cir. 1976) for the fact that such dismissals do not create double jeopardy problems.
87 362 U.S. 511 (1960).

defendants are initially properly joined at trial, "subsequent severance [is] controlled by Rule 14."[88]

In determining that no Rule 14 prejudice arose in *Schaffer,* the Court relied on the fact that the jury was adequately instructed in regard to the evidence against each defendant. The Court warned, however, that where "the charge which originally justified joinder turns out to lack the support of sufficient evidence, a trial judge should be particularly sensitive to the possibility of such prejudice."[89]

The Seventh Circuit addressed the *Schaffer* question in *Brandom v. United States,*[90] where the court remarked that "bad faith" on the part of the government in bringing the ill-fated conspiracy charge would be sufficient to establish prejudice, and hence reversal would follow. However, the court concluded that a "[s]ufficient basis is present here to preclude any finding of bad faith [since] [e]vidence did exist of a common business relationship between all the defendants. . . ."[91] When the Second Circuit in *United States v. Branker*[92] found that a conspiracy charge which was dismissed by the judge at the close of the government's case had been brought in good faith, it offered some criteria for district courts when it defined "good faith" as the "reasonable expectation that sufficient proof [of the charge] would be forthcoming at trial."[93]

This objective standard for determining the government's good faith was at the same time made more subjective yet more precise in *United States v. Ong.*[94] In *Ong,* the appellants argued that tape recordings in the possession of the government conclusively demonstrated that no conspiracy existed between the co-defendants, and thus the conspiracy charge was grounded on the government's bad faith. Although the court agreed with the defendants that the evidence in the government's possession could not support the conspiracy, it nevertheless extended the concept of good faith.

> [T]he government ostensibly knew that the tapes revealed antagonism and distrust between Ong and Young that would have impaired any relationship conducive to the success of the conspiracy. Clearly the government cannot have acted in good faith unless it had a reasonable expectation that it could prove Young's participation in the conspiracy despite this contrary evidence. We find that the government's case, albeit based on a novel and questionable theory of conspiracy, satisfied this standard. * * * We may not agree that the law of conspiracy should be extended so far (citation omitted). *We do not, however, equate novelty or even error with bad faith. In the absence of proof that the government's theory was frivolous or clearly rejected by recent*

88 *Id.* at 515.
89 *Id.* at 516.
90 431 F.2d 1391 (7th Cir. 1970).
91 *Id.* at 1396. *See also* United States v. Nims, 524 F.2d 123, 126 (5th Cir. 1975), *cert. denied,* 426 U.S. 934 (1976), in which the conspiracy count was not dismissed by the trial judge, but rather submitted to a jury which returned a verdict of acquittal. In such a case, defendants are for all practical purposes foreclosed from showing bad faith, since the fact that the judge failed to direct a verdict will generally show that the judge found "ample evidence from which a jury could have found a conspiracy."
92 395 F.2d 881 (2d Cir. 1968), *cert. denied,* 393 U.S. 1029 (1969).
93 *Id.* at 887 (quoting United States v. Aiken, 373 F.2d 294, 299 (2d Cir.), *cert. denied,* 389 U.S. 833 (1967)). This standard was adopted by the Seventh Circuit in Brandom v. United States, 431 F.2d 1391, 1396 (7th Cir. 1970).
94 541 F.2d 331 (2d Cir. 1976).

> *precedent of which it was or should have been aware, we will not find that an argument has been prompted by bad faith simply because it is unsuccessful.*[95]

As a result of *Ong,* unless an appellant can demonstrate to the appellate court's satisfaction that the conspiracy charge was completely frivolous or point to specific case law rejecting the government's legal theory of conspiracy, good faith will be found to exist, and the appellant's only recourse will be to attempt to demonstrate *actual* prejudice by way of a Rule 14 motion.[96] Of course, if "bad faith" *is* proven, the court will conclusively *infer* the existence of prejudice.

D. *Rule 8—Waiver*

Barring very unusual circumstances, the failure of a defendant to move to sever offenses and/or defendants pursuant to Rule 12(b)[97] prior to trial and to renew the motion at the close of the evidence is viewed by some courts as a waiver of the Rule 8 deficiencies. For instance, in *United States v. Harris,* the Seventh Circuit found that defendants were initially properly joined under Rule 8(b).[98] However, when the appellant was dismissed from count two, joinder became improper, because the two defendants were separately charged with two unrelated offenses. Yet, the court found that when the government's motion to dismiss Harris from count two was granted, appellant should have renewed her pre-trial motion for severance. Instead, she moved unsuccessfully for acquittal on the count remaining against her, and thus, said the court, waived her objection to misjoinder. In accord is *United States v. Quinones,*[99] where the First Circuit asserted that defendant waived any claim of misjoinder by failing to move for a severance at trial when he became aware of the misjoinder.[100]

Not all of the decisions apply the waiver doctrine as vigorously as the cases

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95 *Id.* at 337-38 (emphasis added).

96 It must be pointed out that even if the conspiracy count is brought in good faith by the Government but is thereafter dismissed, the potential for subsequent prejudice is great and defense counsel should be especially alert to point out those possibilities to the court. *Branker, supra,* is an excellent illustration of this point. In *Branker,* although the court rejected defendant's claim of bad faith, it nevertheless found reversible error in the trial judge's failure to sever because of the large number of joined counts (originally 84) and the jury's inability to compartmentalize the evidence despite adequate cautionary instructions.

97 Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. . . . The following must be raised prior to trial:

. . . .

(2) Defenses and objections based on defects in the indictment or information . . . ; or

. . . .

(5) Requests for a severance of charges or defendants under Rule 14.

FED. R. CRIM. P. 12(b).

Joinder which falls outside the criteria of Rule 8 are considered "defects" in the charging instrument, which are raised under 12(b)(2), while joinder satisfying Rule 8 which is nevertheless deemed misjoinder because of prejudice considerations are objectionable under 12(b)(5).

98 211 F.2d 656, 659 (7th Cir. 1954). It is not at all clear that the original joinder was indeed proper, since the two separate offenses were not alleged to have occurred as part of a series of acts or transactions. Nevertheless, once defendant Harris was dismissed from the second count, joinder was clearly improper.

99 516 F.2d 1309 (1st Cir.), *cert. denied,* 423 U.S. 852 (1975).

100 Although the court found that defendant had waived his claim, it went on to hold that, even if there was no waiver, it would find the offenses properly joined. *Id.* at 1312.

referred to above. For example, the Seventh Circuit in *United States v. Gougis*[101] took a different view of the matter when the defendant argued that he had been misjoined with his co-defendants in contravention of Rule 8(b). On appeal, the government urged that Gougis' failure to object to the improper joinder either before or during trial constituted waiver of the claim.[102] In response, Judge Duffy explained:

> It is true that Rule 12 (b)(2), F.R.Cr.P., requires the defendant to make a motion before trial if he objects to the joinder. But, the rule also states that "the court for cause shown may grant relief from the waiver." An appellate court, like the trial court, should not be barred from considering on the merits whether relief should be granted under Rule 12(b)(2).[103]

In *United States v. Bova,*[104] the government asserted that the defendant was barred from appealing the Rule 8(b) misjoinder because he did not renew his pre-trial objection to joinder at trial. The Fifth Circuit, however, stated that the question of renewal was irrelevant in that, where there has been misjoinder in violation of Rule 8(b), the trial court has no choice but to sever, and its failure to do so constituted plain error.[105] Thus, it appears that one is not necessarily precluded from judicial relief for failing to object in timely fashion to Rule 8 deficiencies. The attorney's failure to raise objections prior to trial and to renew the motion at the close of the evidence, however, is a risk not worth taking, given the language of Rule 12 and the literal interpretation many of the courts have given it.

E. *Effect of Rule 8 Misjoinder*

Whenever the requirements of Rule 8(a) (joinder of offenses) or Rule 8(b) (joinder of defendants) are not met, misjoinder results. The remedy for misjoinder is simply a severance—separate trials of either defendants or offenses, depending upon the nature of the misjoinder. However, if defendant fails to properly object to the misjoinder or his motion to sever is denied, the question is then left to the appellate court to determine the effect of that misjoinder. The result of defendant's appeal may vary in accordance to which circuit he appeals, as well as whether the misjoinder was one of offenses or defendants.

Although it is clear that the ". . . granting of a motion for severance, where there has been a misjoinder, is mandatory and not discretionary with the district courts . . ."[106] and that ". . . a trial judge has no discretion to deny a motion for severance when counts are misjoined, and that to do so would be error . . . ,"[107] there is a rift among the various circuits as to whether or not the

101 374 F.2d 758 (7th Cir. 1967).
102 *Id.* at 761.
103 *Id.* at 761-62.
104 493 F.2d 33 (5th Cir. 1974).
105 *Id.* at 35, n. 4.
106 United States v. Bova, 493 F.2d 33, 35 (5th Cir. 1974); United States v. Graci, 504 F.2d 411, 413 (3d Cir. 1974); both citing McElroy v. United States, 164 U.S. 76 (1896).
107 Baker v. United States, 401 F.2d 958, 973 (D.C. Cir. 1968), *cert. denied,* 400 U.S. 965 (1970).

trial judge's error may be deemed harmless on review. The harmless error doctrine, embodied in Federal Rules of Criminal Procedure 52(a) would obviate the need for reversal when the appellate court finds that the result of the trial would have been the same in spite of the error.[108]

While the law conflicts among the circuits in regard to the applicability of the harmless error doctrine in cases of misjoinder and is by no means settled, the rule which seems to be evolving, very broadly stated, is that Rule 8(a) offense misjoinder *may* constitute harmless error, while misjoinder of defendants under Rule 8(b) mandates a finding of prejudice and hence reversal. Not all circuits have spoken on both Rule 8(a) and 8(b) misjoinder, but the Third Circuit in *United States v. Graci*[109] has made clear its position on the issue and it is probably the most far-reaching of any of the circuits. *Graci* involved both the misjoinder of defendants and offenses. After finding such misjoinder, the court did not (as others have) limit its rejection of harmless error to merely the misjoinder of defendants. Rather, in finding the harmless error doctrine inapplicable to *all* kinds of misjoinder, the court reasoned that

> we are dealing with statutory rights expressly conferred. Congress has in Rule 8 and Rule 13 defined the permissible scope of joint trials of offenses and offenders. It has in Rule 14 provided a mechanism for protecting against prejudice even within that permissible scope. It seems a strained interpretation of the harmless error statute that it was intended to dilute statutory protections expressly granted. The view that violations of Rule 8 and Rule 13 cannot be treated as harmless is expressed by Cipes in 8 Moore's Federal Practice ¶ 8.04(2) (1965) and by Professor Wright, Federal Practice & Procedure, Criminal § 144, at 328-29 (1969).[110]

But the District of Columbia Court of Appeals took a contrary stance, adopting the general rule alluded to above, when it affirmed the appellant's conviction in the face of misjoined offenses. In *Baker v. United States,*[111] appellant had contended that ". . . upon a finding of Rule 8 misjoinder the court must *ipso facto* reverse the conviction 'without pausing to consider whether the error was prejudicial.' "[112] In rejecting appellant's view, the court stated:

> As Judge Friendly has said "We see no reason why the undoubted truth that any appeal claiming misjoinder under Rule 8(b) raises a question of law in the strict sense, whereas an appeal from a denial of severance under Rule 14 normally raises only one of abuse of discretion, should carry exemption from the harmless error rule . . . as a corollary." *United States v. Granello,* 365 F.2d 990, 995 (2d Cir. 1966), *cert. denied,* 386 U.S. 1019, 87 S. Ct. 1367, 18 L. Ed. 2d 458 (1967).[113]

108 "Any error, defect, irregularity or variance which does not effect substantial rights shall be disregarded." FED. R. CRIM. P. 52(a).
See also Chapman v. California, 386 U.S. 18, 24 (1967), wherein the Supreme Court upheld the constitutionality of the doctrine.
109 504 F.2d 411 (3d Cir. 1974).
110 *Id.* at 414. Nevertheless, the court added that even if it believed that Rule 52(a) applied, "we would still grant a new trial." *Id.*
111 401 F.2d 958 (D.C. Cir. 1968), *cert. denied,* 400 U.S. 965 (1970).
112 *Id.* at 973.
113 *Id.*

The court went on to reject Professor Moore's view that any Rule 8 misjoinder is "*conclusively* presumed prejudicial."[114] Instead, it would adopt a "per se" rule only in regard to Rule 8(b) misjoinder of defendants, with "no further inquiry into special prejudice . . .",[115] justified on the ground that

> the introduction at the trial of one defendant of evidence which in law is relevant only to the guilt of another *in itself* is prejudicial, and it would be inappropriate to speculate as to the extent to which that evidence may have affected the deliberations of the jury or embarrassed the defendant in presenting his defense. But in a case where it is clear that "no prejudice from the joinder could have occurred," we perceive no reason for ignoring the harmless error rule.[116]

Finally, at least one circuit takes the position that harmless error may be applicable to either offense *or* defendant joinder. The Ninth Circuit in *United States v. Roselli*[117] seemed, ironically, to focus on the language in *Baker* to the effect that when the court finds it clear that no prejudice could have occurred, then the harmless error rule may be applied, and extended it to the situation when the misjoinder is of defendants, rather than offenses. The basis of *Roselli*'s reasoning is, nevertheless, faulty, since it relies on cases where the issue was the joinder of offenses.[118] Moreover, the extension would appear to be *obiter dicta* in that the court found that defendants had been properly joined under Rule 8(b); yet the court exploited the opportunity to elaborate on the applicability of the harmless error doctrine to Rule 8(b) situations.

But, as stated, the prevailing rule in the harmless error debate seems to be the D. C. Circuit position mentioned above. The Eighth Circuit has followed *Baker* in regard to the misjoinder of offenses. In *United States v. Jines,*[119] that court opined that even in the face of erroneous joinder of offenses, the appellant must demonstrate clear prejudice before reversal will follow. And, at least three circuits have expressly held the harmless error doctrine inapplicable to misjoinder of defendants. The First Circuit in *King v. United States*[120] and the Fifth Circuit in *United States v. Bova*[121] and *United States v. Marionneaux*[122] have determined that misjoinder of defendants is "inherently prejudicial." Parenthetically, although both *Bova* and *Marionneaux* involved only the joinder of defendants, the language in *Marionneaux* is sufficiently broad to cover both Rule 8(a) and 8(b) situations and could possibly be used as a basis to extend the Fifth Circuit rule to include misjoined offenses; the *Marionneaux* court enunciated that "Rule 8, F.R. Crim.P., governs the joinder of offenses and the joinder of defendants in the same indictment. *Improper joinder under Rule 8*

114 *Id.* (citing 8 J. MOORE, FEDERAL PRACTICE ¶ 802[1] at 8-4 (Cipes ed. 1967)) (emphasis original).
115 *Id.*
116 *Id.* at 973-974.
117 432 F.2d 879, 901 (9th Cir. 1970), *cert. denied,* 401 U.S. 924 (1971).
118 *Id.* (citing Baker v. United States, 401 F.2d 958); United States v. Granello, 365 F.2d 990 (2nd Cir. 1966); Scheve v. United States, 184 F.2d 695 (D.C. Cir. 1950).
119 536 F.2d 1255, 1257 (8th Cir. 1976).
120 355 F.2d 700, 703 (1st Cir. 1966).
121 493 F.2d 33, 35 (5th Cir. 1974).
122 514 F.2d 1244, 1248 (5th Cir. 1975).

is inherently prejudicial. . . ."[123] Finally, the Fourth Circuit in *United States v. Ingram*,[124] in concluding that the trial of misjoined defendants cannot be harmless error, articulated that

> [t]he rule against jointly indicting and trying different defendants for unconnected offenses is a long-established procedural safeguard. Its purpose is to prohibit . . . allowing evidence in a case against one defendant to be presented in the case against another charged with a completely disassociated offense, with the danger that the jury might feel that the evidence against the one supported the charge against the other. *It is not "harmless error" to violate a fundamental procedural rule designed to prevent "mass trials."*[125]

The state of the law in the Seventh Circuit is not so firm. Although both *United States v. Gougis*[126] and *United States v. Spector*,[127] decided by that circuit, seemed to adopt the *Ingram* position, the subsequent decision in *United States v. Varelli*[128] contains substantial ominous *dicta* to the effect that neither *Gougis* nor *Spector* lays down a *per se* rule in regard to Rule 8(b) misjoinder and would restrict them to their facts. Rather Judge Kerner, speaking for the court, agreed with the American Bar Association Advisory Committee on the Criminal Trial that "a rigid sanction, whereby the prosecutor always would be required to undertake separate new trials, is unduly harsh."[129] Accordingly, until the Seventh Circuit is presented with a case involving the misjoinder of offenses under Rule 8(a) with the government urging that the error is harmless, it is uncertain whether misjoined offenses may constitute harmless error in this circuit. On the other hand, it is probable that this circuit would agree with what appears to be the majority position that prejudice is innate by the very fact of misjoined defendants and the error could not be harmless.

III. Severance Under Rule 14

Generally, defendants jointly indicted are to be jointly tried.[130] However, when a defendant can show that he will be subject to an unfair disadvantage, Rule 14 provides a mechanism by which a defendant can obtain a separate trial. Rule 14 provides:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trial of counts, grant a severance of defendants or provide whatever relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection

123 *Id.* at 1248 (emphasis added).
124 272 F.2d 567 (4th Cir. 1959).
125 *Id.* at 570-71 (emphasis added).
126 374 F.2d 758, 762 (7th Cir. 1967).
127 326 F.2d 345, 351 (7th Cir. 1963).
128 407 F.2d 735 (7th Cir. 1969).
129 *Id.* at 747, citing 45 MINN. L. REV. 1066, 1073 (1961).
130 United States v. Kahn, 381 F.2d 824, 838 (7th Cir.), *cert. denied*, 389 U.S. 1015 (1967); United States v. Bridgeman, 523 F.2d 1099, 1107 (D.C. Cir. 1975); and United States v. Echeles, 352 F.2d 892, 896 (7th Cir. 1965).

in camera any statements or confessions made by the defendants which the government intends to introduce at the trial.

Because the decision to grant a severance pursuant to a motion under Rule 14 is within the sound discretion of the trial court judge,[131] the denial of severance will not be lightly overturned,[132] and in fact is rarely disturbed on review.[133]

The most basic maxim espoused by reviewing courts in regard to Rule 14 is that only if the defendant proves that the lower court's decision not to sever constituted a clear abuse of judicial discretion will its decision be reversed.[134] In practice, courts have been so reluctant to grant severance motions under Rule 14 that one author has suggested its caption be changed from "Relief from Prejudicial Joinder" to "No Relief from Prejudicial Joinder."[135]

Underlying Rule 14 is the notion that a defendant may be prejudiced *even though* joinder under Rule 8 was quite proper. Therefore, a trial judge's discretion is addressed to the "likelihood" of prejudice to a defendant in a joint trial.[136] Prejudice, as contemplated by Rule 14, is not conceived in the ordinary meaning of the term. The federal rules have not ensured that jointly tried defendants receive the same protection as if separately tried.[137] Rather, the government's legitimate interests in avoiding "the incremental burden of duplicating a complex trial or reproducing elusive evidence is a proper consideration in the decision to deny severance."[138] These interests, more often characterized as concerns for judicial efficiency and economy, have been criticized in that they justify mass trials on the ground that "the cheapest, easiest way to send a large group of people to jail is to dispatch them at the same time."[139]

Nevertheless, the twin goals of judicial efficiency and economy *have* justified innumerable joint trials in the face of defendants' claims of prejudice, since a defendant is not entitled to a perfect trial—merely one which is found to be "fundamentally fair" when balanced against the government's interests.[140] In this area, the scales are almost always found to be tipped in the government's favor, towards joinder and judicial efficiency. Courts commence their reasoning with the premise that the danger of prejudice can never be entirely eliminated. Rather, it is the court's duty simply to reduce it to "acceptable proportions."[141]

131 Opper v. United States, 348 U.S. 84, 95 (1954); United States v. Hutul, 416 F.2d 607, 620-21 (7th Cir. 1969); *cert. denied, sub nom.* Sacks v. United States, 396 U.S. 1007 (1970).

132 United States v. Johnson, 478 F.2d 1129, 1131 (5th Cir. 1973).

133 United States v. Crockett, 514 F.2d 64, 70 (5th Cir. 1975).

134 *See, e.g.*, United States v. Johnson, 478 F.2d 1129, 1131 (5th Cir. 1973).

135 Walsh, *Fair Trials and the Federal Rules of Criminal Procedure,* 49 A.B.A.J. 853, 856 (1963). *See also* Comment, *Nelson v. O'Neil: Severance as a Remedy for Bruton Errors,* 46 TEMP. L.Q. 111, 121 (1972).

136 United States v. Crockett, 514 F.2d 64, 70 (5th Cir. 1975).

137 *See* Comment, *Nelson v. O'Neil: Severance as a Remedy for Bruton Errors,* 46 TEMP. L.Q. 111, 120 (1972), raising a potential equal protection argument.

138 United States v. Bridgeman, 523 F.2d 1099, 1107 (D.C. Cir. 1975) (citing U.S. v. Shuford, 454 F.2d 772, 777 (4th Cir. 1971)); *See also* United States v. Mardian, 546 F.2d 973, 980 (D.C. Cir. 1976) that "in passing on a motion for severance the court must consider not only the burdens on the prosecution, but also the burdens any new trial would place on the court, the witnesses, and a new jury panel."

139 Walsh, *supra* note 135, at 857.

140 Woodcock v. Amaral, 511 F.2d 985, 995 (1st Cir. 1974).

141 *Id.* at 994.

To that end, it is the purpose of this discussion to investigate what courts have deemed to constitute an acceptable level of prejudice—that is, the maximum amount of partiality permissible before an appellate court will find that a trial court has clearly abused its discretion in failing to order a severance.

At the outset, it is imperative to recognize that on appeal Rule 14 prejudice is conceived only in terms of constitutional dimensions. It is most frequently identified as that prejudice which violates a defendant's constitutional right to a fair trial. Judge Swygert, speaking for the Seventh Circuit, articulated the standard which an appellant must meet on review:

> A defendant bears the burden of demonstrating that he has been prejudiced by the joinder; that burden is a difficult one. . . . *Joinder must be shown to have rendered the trial unfair in order to counterbalance the Government's valid interest,* as expressed in Rule 14, in avoiding a multiplicity of trials.[142]

The concept of fundamental fairness is the very essence of Rule 14 prejudice. Consequently, in those cases where prejudice has been acknowledged, defendants framed their disadvantage in terms of a constitutional deprivation. The result of this constitutional limitation on Rule 14 tends towards the quixotic, since in practice, the rule is dispensable. In the absence of the rule, an appellant could still argue the constitutional infirmities of his trial on appeal.

It is fundamental to note, however, that a trial court is not necessarily limited to a showing of constitutional deprivation. The constitutional analysis arises on appeal, because appellate courts are wont to find that a trial court abused its sound discretion in denying the severance motion, unless the denial has resulted in actual derogation of defendant's constitutional right to a fair trial. Thus, trial courts have much greater latitude to conclude that prejudice exists or is imminent in a joint trial. And, generally, their finding will be upheld on appeal unless defendant can successfully point to a constitutional deprivation.[143]

Although (for obvious reasons) few cases are appealed when the trial court grants a severance motion, *Garris v. United States*[144] illustrates the distinction between a trial court's and an appellate court's handling of a prejudice claim. In *Garris,* the government's motion for severance was granted over defendant's objection.[145] On appeal, the court emphasized that ". . . the test is the same whether the motion for severance of offenses is made by the prosecution or the defense, whether there can be a 'fair determination of the defendant's guilt or innocence. . . .' "[146] In response to the defendant's argument that the government was not prejudiced at all, but merely inconvenienced, the D. C. Circuit attempted to define the amorphous concept of prejudice within the meaning of Rule 14,

142 United States v. Tanner, 471 F.2d 128, 137 (7th Cir. 1972), *cert. denied,* 409 U.S. 949 (1972) (emphasis added). *Accord* United States v. Crockett, 514 F.2d 64, 70 (5th Cir. 1975); United States v. McGruder, 514 F.2d 1288, 1290 (5th Cir. 1975).

143 This is so because the standard for ascertaining prejudice changes substantially on appeal. *See* text accompanying notes 144-47 *infra.*

144 418 F.2d 467 (D.C. Cir. 1969).

145 It is essential to note that the use of a Rule 14 motion for severance is not limited to defendants. Although the government palpably has less need to invoke the motion, it clearly may do so when it can demonstrate to the trial court's satisfaction that it will be "prejudiced" by a joint trial. Such was the government's contention in *Garris.*

146 418 F.2d at 469, n.6.

and suggested that a greater degree of prejudice must be found by a reviewing court than a district court. From the perspective of a trial court, the requisite level of prejudice need not be

> as great as the prejudice an appellate court must find for reversible error. . . . Its meaning is not subject to rigid definition, and depends to a considerable extent on the perception of the district judge. Prejudice is not limited to a showing of irrevocable damage, certain to occur, and impossible to overcome. Prejudice may also lie in shouldering substantial risk that a situation will not be remedied.[147]

The standards for determining whether a defendant has in retrospect sustained enough prejudice so as to require severance pursuant to Rule 14 are judge-made. Therefore, any analysis of Rule 14's application necessitates a survey of the more common fact situations which appellate courts have ascertained as coming either within or outside the scope of Rule 14 prejudice.

Courts unanimously agree that the fact that a defendant stands a better chance for an acquittal if he were tried for each offense separately or apart from co-defendants is an insufficient demonstration of prejudice when balanced against the countervailing policy of judicial expediency. As the Seventh Circuit stated in *United States v. Allstate Mortgage Corp.*:[148]

> Severance will be granted only for the most cogent reasons. The moving party must show that he will be unable to obtain a fair trial without severance, not merely that a separate trial will offer a better chance for acquittal (citation omitted). Another statement of the rule is that judicial economy, efficiency, speed and public interest in avoiding multiple trials dictate that defendants jointly indicted should be tried together, except for the most compelling reasons (citation omitted).[149]

Thus, even where a defendant characterizes his/her objection in terms of an increased difficulty in presenting a defense[150] or that a separate trial would have offered defendant a strategic advantage,[151] unless he can show in addition thereto substantial prejudice in the form of a constitutional deprivation which renders the joint trial fundamentally unfair, appellate courts will uniformly affirm the denial of defendant's motion for severance. Hence, in *United States v. Kahn*,[152]

147 *Id.* at 470. In *Garris*, the Court of Appeals thus affirmed the granting of the government's motion for a severance of offenses because the victims of one of the thefts were scheduled to be out of town during the summer, while the victim of the other theft had since moved out of state and would be unable to return in the fall due to the fact that she was a school teacher.

148 507 F.2d 492, 495-96 (7th Cir. 1974), *cert. denied,* 421 U.S. 999 (1975).

149 *Id. See also* United States v. Caldwell, 543 F.2d 1333, 1360, n. 137 (D.C. Cir. 1974); United States v. Gorham, 523 F.2d 1088, 1092 (D.C. Cir. 1975); United States v. Corr, 543 F.2d 1042, 1052 (2nd Cir. 1976); United States v. Park, 531 F.2d 754, 762 (5th Cir. 1976); United States v. Nell, 526 F.2d 1223, 1230-31 (5th Cir. 1976); United States v. Abraham, 541 F.2d 1234, 1240 (7th Cir. 1976); United States v. Serlin, 538 F.2d 737, 743, n.5 (7th Cir. 1976); United States v. Bastone, 526 F.2d 971, 983 (7th Cir. 1975); United States v. Isaacs, 493 F.2d 1124, 1160 (7th Cir.), *cert. denied,* 417 U.S. 976 (1974); United States v. Cervantes, 466 F.2d 736, 739 (7th Cir.), *cert. denied,* 409 U.S. 886 (1972); United States v. Blue, 440 F.2d 300, 302 (7th Cir.), *cert. denied,* 404 U.S. 836 (1971).

150 *See* Johnson v. United States, 356 F.2d 680, 682 (8th Cir.), *cert. denied,* 385 U.S. 857 (1966).

151 United States v. Cravero, 545 F.2d 406, 412 (5th Cir. 1976).

152 381 F.2d 824 (7th Cir.), *cert. denied,* 389 U.S. 1015 (1967).

for example, the court found no abuse of discretion in the trial court's denial of severance, when the defendant did not show a *"clear likelihood* of confusion in the jurors' minds so great as to prejudice the defendants. . . ."[153]

Despite the appellate courts' conservative view of prejudice, there exist certain situations where appellate courts have found substantial prejudice more likely to occur. It should be recognized, however, that there are no limits as to what a defendant may on appeal contend caused him to be substantially prejudiced in his defense. The more common grounds raised on appellate review are the subject of the following discussion.

A. *Application of Rule 14 to Joined Offenses*

1. Joinder of Perjury and a Substantive Offense

One area once the subject of Rule 14 motions for severance now appears to have become settled in the Seventh Circuit. It is clear that a defendant will not be found to have suffered prejudice by the mere fact that (s)he was tried jointly for perjury in addition to the underlying substantive offense.[154] Nor is the objection of Rule 8(a) misjoinder available to a defendant faced with the joinder of such offenses. Because the perjury charge usually emanates from the accused's testimony in regard to the substantive charge, joinder of the offenses is consistent with the provisions of Rule 8(a) permitting offense joinder so long as the offenses arose as part of the same series of acts or transactions or part of a common scheme or plan.[155]

The rationale for the courts' adamant refusal to recognize even the potential for prejudice in such situations was set out in the seminal case of *United States v. Pacente,*[156] in response to the appellant's concern that the petit jury's awareness that the grand jury had disbelieved him would affect their determination. The court reasoned that a jury would follow the judge's instructions that defendant's guilt or innocence in one court should not affect their verdict in another. The court felt that instructions acted as a "meaningful protection against the possibility that the trial jurors would give weight, in considering whether to convict on [the extortion count], to the determinations the grand jurors made in indicting on [the perjury count]."[157] The *Pacente* rationale was quickly reiterated in *United States v. Braasch,*[158] where the court simply relied on *Pacente* to reject

153 *Id.* at 839 (emphasis added). The court also pointed out that a "strong showing of prejudice" is necessary before a trial court's decision will be reversed. *Id. Accord* United States v. Hutul, 416 F.2d 607, 621 (7th Cir. 1969), *cert. denied, sub nom.* Sacks v. United States, 396 U.S. 1007 (1970).

154 When an accused testifies before a grand jury, the grand jury may return an indictment charging him/her with perjury as well as the substantive offense under investigation.

155 *See, e.g.,* United States v. Isaacs, 493 F.2d 1124, 1159 (7th Cir.), *cert. denied,* 417 U.S. 976 (1974), where the court concluded that because all the offenses charged were connected with, or arose out of a common plan to corruptly influence the regulation of horse racing, "[t]he perjury charge against Kerner related to his involvement with the racing industry, and evidence of that involvement was pertinent to the proof of the other offenses."

156 503 F.2d 543 (7th Cir.), *cert. denied,* 419 U.S. 1048 (1974).

157 *Id.* at 548.

158 505 F.2d 139 (7th Cir. 1974), *cert. denied,* 421 U.S. 910 (1975).

appellant's claim of prejudice, explaining that joinder of perjury with a connected substantive count "has been given full approval by this circuit."[159]

Nevertheless, the Seventh Circuit's sanction of such joinder has been the subject of criticism. One commentator has pointed out that, despite the court's logic, joinder in a single indictment of substantive offenses and a charge of perjury is prejudicial because it

> effectively prevents a defendant from testifying on his own behalf, it prevents him from obtaining untainted witnesses and it may even force him to testify when he would prefer not to. Despite judicial protestations to the contrary the perjury engendered by such joinder cannot be cured by after-the-fact devices such as limiting instructions to the petit jury.[160]

2. Specific Types of Prejudice Most Common to Offense Joinder

In *Drew v. United States*,[161] the District of Columbia Court of Appeals described three common means by which a defendant may be prejudiced when offenses are joined against him in a single trial.

> (1) [H]e may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find. A less tangible, but perhaps equally persuasive, element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one. Thus, in any given case the court must weigh prejudice to the defendant caused by the joinder against the obviously important considerations of economy and expedition in judicial administration.[162]

The potential for such prejudice is especially great when offenses are joined under Rule 8(a) merely because they are of the same or similar character.

Although the *Drew* court classified into three separate categories defendants' most common fears of prejudice, the three types of prejudice necessarily overlap. Nevertheless, an attempt shall be made to discuss separately each category (i.e., defendant's inability to present separate and perhaps inconsistent defenses, the use of joined offenses to bolster an inference of the accused criminal propensity in the minds of the jury, and the jurors' inability to effectively discriminate among evidence presented as to separate offenses).

a. *Separate Defenses*

In *Cross v. United States*,[163] Judge Bazelon of the D.C. Circuit recognized that

159 *Id.* at 150.
160 Comment, *Joinder of Substantive Offenses and Perjury in One Indictment*, 66 J. CRIM. L. & C. 44, 55 (1975).
161 331 F.2d 85 (D.C. Cir. 1964).
162 *Id.* at 88.
163 335 F.2d 987 (D.C. Cir. 1964).

> [p]rejudice may develop when an accused wishes to testify on one but not the other of two joined offenses which are clearly distinct in time, place and evidence. His decision whether to testify will reflect a balancing of several factors with respect to each count: the evidence against him, the availability of defense evidence other than his testimony, the plausibility and substantiality of his testimony, the possible effects of his demeanor, impeachment, and cross-examination. But if the two charges are joined for trial, it is not possible for him to weigh these factors separately as to each count. If he testifies on one count, he runs the risk that any adverse effects will influence the jury's consideration of the other count. Thus he bears the risk on both counts, although he may benefit on only one. Moreover, a defendant's silence on one count would be damaging in the face of his express denial of the other. Thus, he may be coerced into testifying on the count upon which he wished to remain silent.[164]

In *Cross*, the defendant wished to present a defense only to the second count of an indictment, but was compelled to forego his fifth amendment right to remain silent as to count one rather than risk raising an inference as to his guilt by silence.[165] His alibi defense as to count two was believed by the jury, which acquitted him. However, the court found his testimony unconvincing as to the count on which he had preferred not to testify. The appellate court observed that "[i]n a separate trial of that count the jury would not have heard his admissions of prior convictions and unsavory activities; nor would he have been under duress to offer dubious testimony on that count in order to avoid the damaging implication of testifying on only one of the two joined counts."[166] In concluding that appellant was so "embarrassed and confounded"[167] in his defense as to constitute prejudice under Rule 14, Judge Bazelon was compelled to distinguish precedent which had reached a contrary result. The facts presented to the court in *Dunaway v. United States,*[168] an earlier D. C. Circuit opinion, were substantially identical to those in *Cross*. Like Cross, Dunaway was acquitted on one of the two offenses joined for trial. Like Cross, he had testified in regard to the two offenses without limitation. Yet this same court of appeals had determined that Dunaway "had a fair choice to take the stand or not uninfluenced to any significant degree by the consolidation."[169] In contrast, in *Cross*, Judge Bazelon concluded that Cross had no such "fair choice."

It would seem that subsequent courts may choose to follow either the *Cross* or *Dunaway* lead, depending on which result they prefer in advance to reach, simply by concluding that a defendant had a fair choice or (s)he did not. However, in practice, subsequent courts have uniformly followed *Dunaway*. Indeed, the District of Columbia Court of Appeals, in *Baker v. United States,*[170] itself chose to restrict the impact of *Cross*. In *Baker,* the defendant had wished to testify on seven counts, but remained mute on two. On appeal, defendant relied

164 *Id.* at 989.
165 Although appellant raised a fifth amendment claim, the court found it unnecessary to reach the constitutional question, since it concluded that appellant was prejudiced within the meaning of Rule 14.
166 Cross v. United States, 335 F.2d at 990-91.
167 *Id.*
168 205 F.2d 23 (D.C. Cir. 1953).
169 *Id.* at 26.
170 401 F.2d 958 (D.C. Cir. 1968), *cert. denied,* 400 U.S. 965 (1970).

on *Cross* for the proposition that "a timely and bona fide election by the accused to testify as to some counts and not as to others requires a Rule 14 severance."[171] In finding that severance was *not* required under Rule 14, the court explained that

> [t]he essence of our ruling in *Cross* was that, because of the unfavorable appearance of testifying on one charge while remaining silent on another, and the consequent pressure to testify as to all or none, the defendant may be confronted with a dilemma: whether, by remaining silent, to lose the benefit of vital testimony on one count, rather than risk the prejudice (as to either or both counts) that would result from testifying on the other. Obviously, no such dilemma exists where the balance of risk and advantage in respect of testifying is substantially the same as to each count. Thus unless the "election" referred to by appellant is to be regarded as conclusive —and we think it should not be—no need for a severance exists until the defendant makes a convincing showing that he has both important testimony to give concerning one count and strong need to refrain from testifying on the other. In making such a showing, it is essential that the defendant present enough information regarding the nature of the testimony he wishes to give on one count and his reasons for not wishing to testify on the other— to satisfy the court that the claim of prejudice is genuine and to enable it intelligently to weigh the considerations of "economy and expedition in judicial administration" against the defendant's interest in having a free choice with respect to testifying.[172]

When the *Baker* court applied its newly defined standard to the facts therein, it found that the defendant had informed the trial court that his reason for wishing to remain silent on two counts was a fear of potential future prosecutions, which the court found to be insubstantial. Furthermore, defendant had failed to describe for the court the nature and importance of the testimony he wished to offer on the remaining counts. The court further distinguished *Cross* on the ground that Cross' prior convictions were introduced as a result of his taking the stand, whereas in *Baker,* no such prejudice inhered.[173]

Several circuits have now followed the *Baker* court lead. The Fifth Circuit, in both *United States v. Williamson*[174] and *United States v. Park,*[175] has adopted the standard for severance set out in *Baker.* In both cases, the courts found that appellants had failed to satisfy the showing mandated in *Baker.* Likewise, in *Holmes v. Gray,*[176] the Seventh Circuit found *Cross* inapposite, since the two offenses had occurred within a short period of time. Rather, the court sided with the Fifth Circuit's view in *Williamson* "that severance is not mandatory every time a defendant wishes to testify to one charge but to remain silent on another. If that were the law, a court would be divested of all control over the matter of

171 *Id.* at 976 (quoting from *Cross*).
172 *Id.* at 976-77.
173 *Id.* at 977. But note that in *Dunaway,* fear of impeachment by defendant's prior criminal acts did not compel severance.
174 482 F.2d 508, 512 (5th Cir. 1973).
175 531 F.2d 754, 763 (5th Cir. 1976).
176 526 F.2d 622 (7th Cir. 1975). Although this case was based on a petition for habeas corpus relief following a state court conviction, the Seventh Circuit applied federal standards, since the Wisconsin Joinder Statute was substantially similar to the federal rules on joinder and severance.

severance and the choice would be entrusted to the defendant."[177] *Holmes* is especially noteworthy in that it reached the constitutional issue of whether defendant's fifth amendment interest was violated. Speaking for the court, Judge Swygert held that "[w]here joinder is proper and there has been found no substantial prejudicial effect, the Fifth Amendment is not violated because a defendant must elect to testify as to both charges or to none at all."[178]

Thus, it would appear that trial courts will be unlikely to sustain a defendant's motion for severance when the defendant claims that he fell victim to the cruel dilemma of wishing to offer a defense to one count but not another. And it is even more unlikely that an appellate court will find that a trial judge abused his discretion in denying a defendant's motion on such a ground. Moreover, unless defendant (1) timely informs the court of his decision to testify on fewer than all counts, (2) identifies to the court's satisfaction the nature of the testimony he wishes to offer and (3) renders an adequate explanation for preferring not to testify in regard to the other counts, an appellate court may find the issue waived on appeal or, at the very least, conclude that no prejudice resulted. Finally, even if defendant satisfies all prerequisites, the court may reason that the appellant nevertheless enjoyed a "free choice" in regard to his decision to testify on each count. Thus, while the *Cross* argument might have some appeal to individual district courts, federal defense attorneys have little in the way of sound legal support for the "separate defenses" objection.

b. *Evidence of Other Crimes*

The law of evidence proscribes the admission into evidence of one crime in order to prove a defendant's disposition to commit crime.[179] The law, however, has carved out exceptions to this general prohibition in certain situations where the probative value of such "other crimes" evidence is found to outweigh prejudice to the defendant. Thus, when evidence of another crime is not offered solely to establish the accused's bad character to infer criminal disposition, but rather is relevant to the issue of motive, intent, the absence of mistake or accident, identity of the accused, knowledge or a common scheme or plan,[180] then the evidence is properly admitted.

As a result of these exceptions to the "other crimes" rule, courts reason that a defendant whose other crime falls within the exceptions would be in no better position if he were granted separate trials. Therefore, even if an accused is prejudiced in the strict meaning of the term, "separate trials offer no panacea where the evidence of each of the crimes charged would have been admissible in separate trials."[181] Consequently, the District of Columbia Circuit Court of Appeals

177 526 F.2d at 626. *Accord* United States v. Lewis, 547 F.2d 1030, 1034 (8th Cir. 1976), in which the court concluded that the appellant failed to give the district court adequate notice of his claim of prejudice when he wished to present an alibi defense to one count, but not another.

178 526 F.2d at 626.

179 McCormick, Handbook of the Law of Evidence, § 157 (2d ed. 1972). *See* Drew v. United States, 331 F.2d 85, 89 (D.C. Cir. 1964) for a discussion of the rationale behind the "other crimes" rule.

180 331 F.2d at 90.

181 526 F.2d at 625.

has formulated a two-tiered analysis to be employed when dealing with a defendant's objection to the joint trial of separate offenses. The initial inquiry is whether or not the evidence of one crime would be admissible at the separate trial of the other offense. If admissible, under the exceptions to the "other crimes" rule outlined above, then clearly the defendant is not prejudiced by a joint trial of the two or more offenses and the inquiry ends. If, on the other hand, evidence of the other crime would not be permitted at a separate trial, the court must consider whether or not the evidence "is so separable and distinct with respect to each crime, and so uninvolved, and the offenses are of such nature, that the likelihood of the jury having considered evidence of one as corroborative of the other is insubstantial."[182]

It is essential to note that the relevant standard for determining prejudice in such a case is not the "possibility" that the jury may cumulate evidence, but rather the "likelihood." Since the danger that the jury will not compartmentalize the evidence is always present,[183] a higher potential for prejudice must be demonstrated before a court will reverse the trial court's denial of severance. Thus, in *United States v. Lotsch,*[184] Judge Learned Hand of the Second Circuit inquired ". . . whether the trial as a whole may not become too confused for the jury,"[185] and concluded that, since the evidence as to each count was short and simple, the jury could keep it separate.[186] And in *Dunaway v. United States,*[187] defendant's claim of prejudice was rejected, although the evidence would not have been admissible in a separate trial, because defendant could not show to a substantial likelihood that the jury would be unable to discriminate between the evidence.

On the other hand, in *Drew v. United States,*[188] presently the leading case on this question, the District of Columbia Circuit determined that the "simple and distinct" test in regard to the evidence of each crime had not been met. Explaining that "the very essence of this rule is that the evidence be such that the jury is unlikely to be confused by it or misuse it,"[189] the court pointed to specific instances in the record where witnesses' responses indicated confusion as to which crime they were being questioned about. The court, attributing the confusion to the fact that the crimes were so similar superficially, warned that when separate crimes are jointly tried ". . . both court and counsel must recognize that they are assuming a difficult task the performance of which calls for a vigilant precision in speech and action far beyond that required in the ordinary trial."[190]

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182 205 F.2d at 27.
183 United States v. Lotsch, 102 F.2d 35, 36 (2d Cir.), *cert. denied,* 307 U.S. 622 (1939).
184 *Id.*
185 *Id.* at 36.
186 *Id.* There is dictum in *Lotsch* to the effect that evidence of other crimes is *always* relevant as probative of an accused's criminal disposition, a view explicitly rejected by the court in Dunaway v. United States, 205 F.2d at 26-27. Nonetheless, *Lotsch* remains viable in regard to the question of whether or not a defendant is prejudiced by the admission of other crimes evidence, but must be read in light of *Dunaway* and Drew v. United States, 331 F.2d 85 (D.C. Cir. 1964).
187 205 F.2d 23.
188 331 F.2d 85.
189 *Id.* at 93.
190 *Id.* at 94.

The Seventh Circuit, in *United States v. Morabette*[191] and *United States v. Rogers,*[192] has incorporated into its decision the views espoused by the District of Columbia Court of Appeals in *Lotsch* and its progeny.[193] Thus, in *Morabette,* the court simply concluded that, because the evidence of the offenses—the illicit operation of two separate distilleries—was so directly connected and the evidence "offered to sustain proof of one would have been admissible upon the trial of the other,"[194] no prejudice resulted.

Rogers, however, presented a more unique situation. There, appellant was one of several defendants indicted in a twelve-count indictment. Count twelve, charging appellant alone, was disposed of through a directed verdict in appellant's favor when the government failed to prove an essential element of the case. The appellate court, acknowledging that in a separate trial evidence of the offenses would not have been admissible, still failed to grant appellant relief since he failed to renew his Rule 14 objection. Because of this waiver, the trial judge was only bound to analyze the potential for prejudice at the time the motion was made, and from that perspective, the appellate court found no abuse of discretion.

Other circuits seem to follow this pattern. Found not to be an abuse of discretion was the trial court's denial of severance in *United States v. Riley,*[195] where the Eighth Circuit explained that evidence concerning the theft of a Vega would have been admissible in a separate trial of the theft of a Cadillac as an exception to the "other crimes" rule as probative of the defendant's state of mind, i.e., that he knew the vehicle was stolen. Similarly, in *United States v. Park,*[196] the Fifth Circuit found that defendant sustained no prejudice when his previous drug conviction would have been admissible in a separate trial as probative of his intent or knowledge. The *Drew* test was also applied in *Baker v. United States*[197] to a nine-count indictment. The *Baker* court found that, as to some of the offenses, evidence would have been admissible at separate trials. The remaining offenses were found to be ". . . sufficiently 'distinct' to enable the jury to keep [them] separate, thus mitigating to some degree the danger of cumulation."[198] Although it disregarded appellant's claims of prejudice, the D.C. Court observed that ". . . it is ordinarily the fact of the defendant's having engaged in prior or subsequent criminal conduct that is likely to be damaging in the eyes of the jury rather than the details of its commission."[199] There is no doubt that this "latent feeling of hostility"[200] against an accused suspected of committing multiple crimes can affect a jury's consideration. Yet, such allegation standing alone will not suffice to require reversal.

191 119 F.2d 986 (7th Cir. 1941).
192 475 F.2d 821 (7th Cir. 1973).
193 Indeed, *Morabette* was relied on by the court in *Drew* for its proposition that the admissibility of other crimes evidence in separate trials is a highly significant factor in determining whether joinder is prejudicial. 331 F.2d at 90 n.12.
194 119 F.2d at 988-89.
195 530 F.2d 767, 770 (8th Cir. 1976).
196 531 F.2d 754, 763 (5th Cir. 1976).
197 401 F.2d 958 (D.C. Cir. 1968), *cert. denied,* 400 U.S. 965 (1970).
198 *Id.* at 975.
199 *Id.*
200 331 F.2d at 88.

In sum, even though evidence of a joined offense could not, under rules of evidence, be admitted at a separate trial, if the evidence of the two or more crimes is deemed to be "separate and distinct" so as to avoid the likelihood of cumulation by the jury, then appellant will be deemed unharmed by the joinder, and thus not entitled to a severance.

c. *Cumulation of Evidence*

Interrelated with the prejudice resulting from the jury's inference of an accused's criminal disposition from the fact of joint offenses is the prejudice a defendant may suffer simply from the jury's inability to discriminate among evidence limited to a particular offense. Defendants often assert on appeal that, when two or more offenses are joined for a single trial, the jury is likely to cumulate the evidence against the defendant and be more apt to find guilt than if each offense were tried individually. But, according to the Eighth Circuit Court of Appeals in *Johnson v. United States,*[201] "[w]eighing the danger of confusion and undue cumulative inference is a matter for the trial judge within his sound discretion. His denial of severance is not grounds for reversal unless clear prejudice and abuse of discretion are shown."

In some cases, this approach has been the basis for judicial relief. In *United States v. Carter,*[202] for example, the appellate court found that the trial court clearly abused its discretion by failing to order a severance when defendant was jointly tried for three separate assaults and robberies. In concluding that the jury must have viewed the evidence cumulatively, the court explained, ". . . as a practical matter the jury must have been influenced by the sum total of the evidence, without segregating, in insulated compartments, the proof under each group of counts."[203]

In support of a contention that the jury improperly cumulated evidence of multiple offenses, it is imperative that defendant show a "*clear likelihood* of confusion on the part of the jury. . . ."[204] Moreover, "[a] severance is not available to defeat an otherwise proper joinder . . . merely to diffuse the probative impact of evidence of one's own guilt."[205] In determining whether or not a jury may have cumulated evidence of separate offenses, a court will look at the evidence in question. If the evidence as to each crime is simple and distinct, most courts will say there was little danger that the jury was unable to limit its consideration of the evidence to the appropriate offense.[206] Finally, if a jury splits its decisions on the various counts involved (for example, finding guilt on one count, and

201 356 F.2d 680, 682 (8th Cir.), *cert. denied,* 385 U.S. 857 (1966) (emphasis added); *See also* United States v. Rajewski, 526 F.2d 149, 155 (7th Cir. 1976).

202 475 F.2d 349 (D.C. Cir. 1973).

203 *Id.* at 351. In *Carter,* the court's discussion points to the conclusion that the offenses were misjoined under Rule 8(a). Nevertheless, the court fails to make any mention of Rule 8(a) and grounds its decision solely upon the finding of Rule 14 prejudice. This may be because of the District of Columbia's conclusion that misjoinder of offenses under Rule 8(a) is not inherently prejudicial and, unless the defendant can show actual substantial prejudice, the trial court's denial of severance will not be reversed. *See* Baker v. United States, 401 F.2d 958 (1968).

204 United States v. McGruder, 514 F.2d 1288, 1290 (5th Cir. 1975) (emphasis added).

205 *Id.*

206 *See, e.g.,* United States v. Lewis, 547 F.2d 1030, 1033 (8th Cir. 1976).

acquitting or failing to reach a verdict on another), an inference will likely be drawn by the courts that the jury was able to discriminate between the evidence offered on each separate count, and that therefore the defendant was not prejudiced.

B. *Application of Rule 14 to Joined Defendants*

1. Illness

One of the most cogent reasons for obtaining a severance of defendants is that the moving party is ill.[207] Since, if sincerely made, a defendant's motion based on illness is not likely to be denied, there exist few cases where the issue is discussed on appeal.

In cases such as this, a defendant may be required to show that a continuance will be insufficient. He may also be required to submit to a court-ordered physical examination. Moreover, courts are not likely to grant a severance on such grounds unless the defendant establishes to the court's satisfaction that a severance is in fact necessitated by the illness.

The problems associated with this argument are illustrated in *United States v. Shotwell Mfg. Co.*[208] In that case, even though the defendant's renewed motion was accompanied by the supporting affidavits of two physicians attesting to his poor health, the Seventh Circuit found that the district court did not abuse its discretion in denying defendant's motion for a severance. In *Shotwell,* appellant, Cain, an officer of Shotwell Mfg. Co., was afflicted with a heart condition. Following a six-month postponement in the proceedings, a court-appointed physician expressed the opinion that Cain could tolerate four to five hours per day of trial. When defendant renewed his motion for severance, contending he was not yet well enough for trial, it was denied. On appeal, the court found that, because of the conflict in the medical testimony, there was no abuse of discretion.

Whether or not a court will grant a severance to a defendant on the basis of his attorney's illness is often far from clear. In most cases, a continuance will probably be deemed to suffice. Even where the court ascertains that the illness was "bona fide and unforeseeable,"[209] unless the accused can show additional potential for prejudice, it is unlikely that the court will recognize his "special interest in representation by experienced counsel of his own choice in whom he can have the kind of confidence that grows from long-standing acquaintance. . . ."[210] Otherwise, the court will look to the ability of replacement counsel to take over the trial.

2. Guilt by Association

Courts are cognizant that in some instances the evidence as to one de-

207 *See, e.g.,* United States v. Bastone, 526 F.2d 971, 975 n.1 (7th Cir. 1975) (where one defendant was severed before trial due to illness); United States v. Joyce, 499 F.2d 9, 21 (7th Cir. 1974) (where the court commented that, had appellant requested a severance or continuance, his hospitalization would almost certainly have justified it).
208 287 F.2d 667, 672 (7th Cir. 1961), *aff'd on other grounds,* 371 U.S. 341 (1963).
209 United States v. Mardian, 546 F.2d 973, 980 (D.C. Cir. 1976).
210 *Id.*

fendant may be so overwhelming that a relatively minor actor may be found guilty as a result of his connection with the more blameworthy.[211] In *Kotteakos v. United States,*[212] the United States Supreme Court acknowledged the dangers of transference of guilt in conspiracy trials. In a few situations, the possibility that guilt will be transferred to a less culpable defendant may be so manifest that even "[p]roper rulings on the admissibility of evidence and lucid limiting instructions to the jury cannot entirely eliminate the danger of prejudice. . . ."[213]

The fact that some element of prejudice might arise in this context is *not* necessarily grounds for judicial relief. For example, in *Woodcock v. Amaral,*[214] the First Circuit, recognizing the potential for such prejudice, nevertheless found that the prejudice had been reduced to acceptable proportions. But even when the prejudice resulting from the element of transferred guilt does reach unacceptable proportions, reversal is still not compelled. Although the appellate court may conclude that a separate trial should have been granted, when that error "affects no substantial rights of the defendant,"[215] the harmless error doctrine will be held applicable. Thus, in *United States v. Ong,*[216] when the court concluded that a jury would have rendered an identical verdict in a separate trial, no reversal was deemed necessary.

In some cases, introduction of evidence in a joint trial, although limited to a single defendant, may be so devastating as to impassion and prejudice the jury against the co-defendants. In *United States v. Haupt,*[217] for example, in a trial for treason alleging that three defendants gave aid and comfort to the enemy during World War II, evidence was adduced against Haupt to the effect that

> he never renounced allegiance to his native country, and never acquired or had any loyalty for this country where he became a naturalized citizen. A situation is dramatically portrayed that is so revolting in its nature as to earn for him the utmost contempt of every loyal citizen. The sordid and disloyal utterances and activities of this defendant as proved could not have done otherwise than deeply stir the passions and emotions of a jury. We are not interested so much with the effect which this contemptuous background had upon his case, but we are concerned with the effect [it] had upon other defendants who were tried with him.[218]

The *Haupt* court was quite obviously taking into consideration the temperament of the times. Still, the reasoning employed in *Haupt* has continuing vitality today in cases where one defendant may appear especially vile or reprehensible to the jury with the effect that the jury may, either consciously or unconsciously, transfer its distaste for that defendant to any person alleged to have been associated with him or her.

211 *See, e.g.,* Woodcock v. Amaral, 511 F.2d 985 (1st Cir. 1974); United States v. Mardian, 546 F.2d 973, 977 (D.C. Cir. 1976) (explaining that "(p)articularly where there is a great disparity in the weight of the evidence, strongly establishing the guilt of some defendants, the danger persists that that guilt will improperly 'rub off' on the others.").
212 328 U.S. 750, 774 (1946).
213 Woodcock v. Amaral, 511 F.2d 985, 994 (1st Cir. 1974).
214 511 F.2d 985.
215 United States v. Ong, 541 F.2d 331, 338 (2d Cir. 1976).
216 541 F.2d 331.
217 136 F.2d 661 (7th Cir. 1943).
218 *Id.* at 673.

Courts are more prone to find prejudicial joinder the greater the possibility of jury confusion. When, for instance, an indictment named twelve defendants in eighty-four counts, the Second Circuit in *United States v. Branker* explained that "as the number of counts is increased, the record becomes more complex and it is more difficult for a juror to keep the various charges against the several defendants and the testimony as to each of them separate in his mind."[219] The *Branker* court observed that

> [t]his kind of prejudice is particularly injurious to defendants who are charged in only a few of the many counts, who are involved in only a small proportion of the evidence, and who are linked with only one or two of their co-defendants. The jury is subjected to weeks of trial dealing with dozens of incidents of criminal misconduct which do not involve these defendants in any way. As trial days go by, "the mounting proof of the guilt of one is likely to affect another." *Schaffer v. United States,* 362 U.S. 511, 523, 80 S. Ct. 945, 952 (1960) (Douglas, J. dissenting).[220]

One of the more politically prominent cases involving the concept of guilt through association is *United States v. Mardian,*[221] where Watergate defendant Mardian appealed the denial of his motion requesting a trial separate from co-defendants Erlichman, Haldeman and Mitchell. Mardian, charged only with conspiracy, relied on the doctrine enunciated by the Second Circuit in *United States v. Kelly,*[222] requiring severance when the evidence against one defendant "is 'far more damaging' than the evidence against the moving party."[223] Yet, the *Mardian* court was unable to rule as a matter of law that the denial of Mardian's pretrial motion for severance constituted an abuse of discretion. Despite the fact that Mardian had made "a substantial pretrial showing of possible prejudice requiring severance under the *Kelly* doctrine," Judge Skelly Wright found it "not so compelling that it was clear Mardian's interest in a separate trial outweighed [those] interests favoring joinder."[224] Nevertheless, the court did find that the trial court erred in failing to grant the motion when it was renewed —by which time it had become clear to the trial court not only that Mardian's role in the conspiracy ended more than nineteen months before the conspiracy itself dissipated, but that a substantial part of the testimony would focus on events after Mardian ceased active participation.[225]

3. Antagonistic Defenses

Oftentimes, joined defendants may not see eye-to-eye on particular aspects of the trial. Yet, occasions are rare in which reviewing courts find that the

219 395 F.2d 881, 887-88 (2d Cir. 1968), *cert. denied,* 393 U.S. 1029 (1969).
220 *Id.* at 888.
221 546 F.2d 973 (D.C. Cir. 1976).
222 349 F.2d 720 (2d Cir. 1965), *cert. denied,* 384 U.S. 947 (1966).
223 546 F.2d at 977.
224 *Id.* at 979.
225 *Id.* at 978. It is incumbent to note that, in reaching its decision to overturn Mardian's conviction, the court also considered Mardian's interest in being represented by his own chosen counsel, who was unable to attend trial because of illness.

particular antagonism which exists among multiple defendants is so great as to go to the very essence of a fair trial and require severance under Rule 14.

Although it is unlikely that a defendant will succeed when relying on antagonistic positions to support a Rule 14 motion, defense counsel should be familiar with the five recurring situations in which the issue is likely to arise: (a) where one defendant's courtroom demeanor is obstreperous or in some other manner offensive; (b) where multiple defendants are represented by identical counsel to their detriment; (c) where defendants are divided on the issue of trial strategy; (d) where one defendant incriminates another at trial; and (e) where one defendant is precluded from commenting on his/her co-defendant's silence because of the fifth amendment. The foregoing presents a broad overview of each of the situations in which co-defendants may find their interests conflicting, and the courts' response to these claims of prejudice.

The prevailing standard in regard to the issue of antagonistic defendants has been articulated by the District of Columbia Court of Appeals and is indicative of the rule elsewhere.[226] They demand that

> [i]n order to demonstrate abuse of discretion by a trial judge, one must show more than the fact that co-defendants whose strategies were generally antagonistic were tried together. . . . At the very least, it must be demonstrated that a conflict is so prejudicial that differences are irreconcilable, and "that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty."[227]

Practical experience has confirmed that appellate courts look with equal disfavor upon this claim of prejudice as any other. Courts are not inclined to find the standard easily achieved.

a. *Co-Defendant's Unruly Conduct at Trial*

United States v. Caldwell[228] presented a rather complex problem where two joined defendants both appealed, alleging for different reasons that they should have been tried apart from one another. Defendant Timm protested because a physician called to testify in support of his insanity defense was precluded by the judge from referring specifically to his co-defendant. But the D. C. Circuit Court of Appeals found his argument specious since there was an insufficient factual basis for the proffered testimony. The thrust of his co-defendant Caldwell's complaint was that Timm's outrageous behavior in the form of verbal remarks directed to both the prosecutor and witnesses prejudiced the jury against him. However, because he failed to *specifically* demonstrate how his defense was damaged, the court could find no basis to conclude there was a carry-over effect.[229]

226 For example, it was cited favorably by the Seventh Circuit in United States v. George, 477 F.2d 508, 515 (7th Cir. 1973).

227 United States v. Robinson, 432 F.2d 1348, 1351 (D.C. Cir. 1970); United States v. Caldwell, 543 F.2d 1333, 1356 (D.C. Cir. 1975); United States v. Gorham, 523 F.2d 1088, 1092 (D.C. Cir. 1975).

228 543 F.2d 1333 (D.C. Cir. 1975).

229 *Id.* at 1360. *See also* United States v. Johnson, 426 F.2d 1112, 1116 (7th Cir.) *cert. denied,* 400 U.S. 842 (1970), (Kiley, J.) (*mem.*) found without merit appellant's claim that his co-defendant's aggravated conduct necessitated severance.

b. *Common Counsel*

Another area in which assertions of antagonistic defenses frequently occur are cases where co-defendants with conflicting interests are represented by the same attorney. Whether or not an appellate court will conclude that severance should have been granted appears to center on the question whether the common counsel was appointed by the court to represent defendants or whether defendants were represented of their own volition by privately retained counsel. Hence, in *United States v. Echeles,*[230] denial of defendant's motion for severance was affirmed by the Seventh Circuit on the ground that both defendants chose to proceed with common counsel after the trial judge advised them and their lawyers prior to trial of the potential for a conflict of interest. On the other hand, the same court held in *United States v. Gougis*[231] that, where co-defendants' interests were in conflict and some of the most damaging testimony against Gougis came from his co-defendant who was represented by the same court-appointed attorney, "Gougis was thus denied his right to the effective assistance of counsel guaranteed by the Sixth Amendment. This error alone requires that the verdict be set aside. . . ."[232]

c. *Conflicting Strategies*

Additionally, conflict may arise in a joint trial when all defendants are unable to agree on common strategy or procedure. However, the case law is not very supportive of joined, but antagonistic, defendants faced with such conflict. For example, in *United States v. Joyce,*[233] some defendants demanded a jury trial, while their co-defendants preferred a bench trial. When faced with that dilemma, the Seventh Circuit held simply that severance was not required, since "[t]here is no right to a bench trial . . . and avoidance of duplicate two week trials is certainly a legitimate reason for withholding consent to the proffered jury waiver."[234]

In *United States v. Williams,*[235] conflict arose when one defendant requested a general instruction to the jury that no inference should be drawn from either defendant's failure to testify. His co-defendant's counsel, afraid that the general instruction would rather work to emphasize the fact that they refused to testify, objected. On appeal, the United States Court of Appeals for the District of Columbia ruled that "a judge does not commit error by granting one defendant's request for a general instruction over the objection of one or more co-defendants."[236] Rather, the judge should read the "general instruction when requested by one defendant, regardless of the wishes of the co-defendant."[237]

230 222 F.2d 144, 151 (7th Cir.), *cert. denied,* 350 U.S. 828 (1955).
231 374 F.2d 758 (7th Cir. 1967).
232 *Id.* at 761.
233 499 F.2d 9 (7th Cir. 1974).
234 *Id.* at 21.
235 521 F.2d 950 (D.C. Cir. 1975).
236 *Id.* at 955.
237 416 F.2d 607, 620-21 (7th Cir. 1969), *cert. denied, sub nom.* Sacks v. United States, 396 U.S. 1007 (1970), (citing Dauer v. United States, 189 F.2d 343, 344 (10th Cir.), *cert. denied,* 342 U.S. 898 (1951)).

d. *Attempts to Transfer Culpability*

Generally, attempts by co-defendants to transfer culpability to one another have been deemed insufficient to require severance. As the Seventh Circuit explained in *United States v. Hutul,*

> [t]he mere fact that there is hostility between defendants or that one may try to save himself at the expense of another is in itself alone not sufficient grounds to require separate trials. It is only when the situation is such that the exercise of common sense and sound judicial judgment should lead one to conclude that one defendant cannot have a fair trial, as that term is understood in law, that a severance should be granted.[238]

Thus, in *United States v. George,*[239] when one defendant tried to save himself at his co-defendant's expense, by making him out to be a blackmailer, the antagonism was insufficient to require a severance. Likewise, in *United States v. Gorham,*[240] when the two appellants on trial for escape from jail moved for a severance when their two co-defendants—women who were accused of assisting the inmates in their abortive escape attempt—presented testimony exculpatory to them while at the same time inculpatory to appellants, the court, in denying their motion, simply stated "[t]his antagonism cannot be equated with an irreconcilable conflict which by itself suggests guilt."[241]

Another case in which an appellant claimed prejudice as a result of his co-defendant's attempt to shift the blame to him was *United States v. Di Giovanni.*[242] There, because appellant's entire defense was that he was not involved but rather the victim of a nefarious scheme to protect the true culprit, the Second Circuit found that his co-defendant's testimony did not prejudice his defense. In *United States v. Johnson,*[243] the Eighth Circuit concluded that defendants' positions were not inconsistent, since one defendant's testimony did not implicate the other.[244] But, meanwhile, in *United States v. Joyce,*[245] when one defendant took the stand and placed the blame on his co-defendant for the mail fraud scheme for which the two were on trial, the Seventh Circuit simply remarked that this was an insufficient reason to require a separate trial.[246]

The Fifth Circuit found abuse of discretion in this area in *United States v. Johnson,*[247] when the trial court had been apprised that appellant's co-defendant had made a confession directly incriminating him and that appellant's defense would be completely at odds with that of his co-defendant. Johnson's defense was that he was not present when the crime in question, the passing of counterfeit

238 477 F.2d 508, 515 (7th Cir. 1973).
239 523 F.2d 1088 (D.C. Cir. 1975).
240 *Id.* at 1092.
241 544 F.2d 642, 644 (2d Cir. 1976).
242 540 F.2d 954, 959 (8th Cir. 1976).
243 *See also* United States v. Johnston, 547 F.2d 282, 285 (5th Cir. 1977).
244 499 F.2d 9 (7th Cir. 1974).
245 *Id.* at 21.
246 478 F.2d 1129 (5th Cir. 1973).
247 *Id.* at 1132. It is important to note that this case did not involve a *Bruton*-type problem, since Johnson's co-defendant took the stand and was subjected to cross-examination concerning his out-of-court confession. *See* text accompanying notes 298-320 *infra.*

money, was committed. In contrast, his co-defendant admitted participation but denied having the requisite mens rea because he was an informant for a police detective and had passed the money to appellant as part of what he thought was a trap. In ruling that the trial court erred in denying appellant's motion for severance, the court laid particular stress on the manner in which appellant had presented his motion. The motion, made before trial, contended that appellant could not obtain a fair trial unless severance were granted and explicitly pointed out how the defenses were antagonistic. In addition, Johnson's counsel attached to the motion a copy of the co-defendant's confession incriminating his client.[248] Thus, it appears that pointing out specific areas of conflict to the district court is a virtual necessity if one hopes to gain relief on the basis of such arguments.

It appears that the "hostile defendant" situation only compels severance when defendants' defenses are "mutually exclusive [where] if one defendant were believed, the other could not be."[249] Illustrative of such antagonistic defenses are cases where one defendant admits participation in the crime but interposes an affirmative defense, as entrapment, insanity, mistake, or duress, and incriminates his co-defendant who denies participation altogether. In such a situation, a court will be more inclined to order severance. In contrast, appellate courts are much less prone to find that a trial judge abused his discretion simply because one defendant attempts to shift the entire guilt in an effort to extricate himself.

e. *Comment by a Co-Defendant on Defendant's Failure to Testify*

Often occurring in conjunction with the hostile defendant situation is the objection that appellant's fifth or sixth amendment rights were violated. This claim can arise from one of two events. First, when a co-defendant or his attorney comments on the fact that appellant failed to testify in his own behalf, appellant can argue that he was penalized for exerting his fifth amendment privilege not to incriminate himself. Secondly, in the converse situation, where appellant did take the stand but his co-defendant did not, appellant may have wished to comment on his co-defendant's silence as an inference of guilt but was precluded from doing so. On appeal, he may argue that he was deprived of his sixth amendment right of confrontation.

In the first situation, defendant's fifth amendment interest is clear and deserves protection. The most prominent case concerning this issue is *DeLuna v. United States*.[250] There, despite the fact that curative instructions had been given to the jury, the Fifth Circuit, speaking through Judge Wisdom, and relying on principles later adopted by the Supreme Court in *Griffin v. California*,[251] held that

> [i]n a criminal trial in a federal court an accused has a constitutionally guaranteed right of silence free from prejudicial comments, even when they

248 United States v. Kahn, 381 F.2d 824, 841 (7th Cir.), *cert. denied*, 389 U.S. 1015 (1967).
249 308 F.2d 140 (5th Cir. 1962).
250 380 U.S. 609 (1965).
251 308 F.2d at 141. For a detailed discussion of the fifth amendment right to silence and its origin, *see id.* at 144-51.

> come only from a co-defendant's attorney. If an attorney's duty to his client should require him to draw the jury's attention to the possible inference of guilt from a co-defendant's silence, the trial judge's duty is to order that the defendants be tried separately.[252]

However, subsequent cases, while affirming *DeLuna*'s premise, have failed to find it apposite to the set of facts presented. The Seventh Circuit, for example, when presented with a similar claim in *United States v. Barney,*[253] distinguished *DeLuna.*

In *Barney,* the co-defendant's counsel had twice attempted to call Barney to the stand, but Barney had declined. In his closing argument, co-defendant's counsel made the following comment to the jury:

> My man took the stand. My man told you what happened. He didn't have to do it. But he did. . . . I submit to you that you don't have to deliberate long on this case as to [my client]. And I don't know about Mr. Barney. Mr. Barney could be guilty of everything in the world and I care less.[254]

In rejecting Barney's claim of prejudice, Judge Swygert explained that, unlike the defendants in *DeLuna,* the defendants in *Barney* were not antagonistic, as their position was that they had been strangers prior to trial. Moreover, he noted that the comments regarding Barney's failure to take the stand were innocuous and "not of such character that the jury would naturally infer them to have been directed against his silence."[255] The judge additionally remarked that:

> In several cases such as this, where no direct comments on a defendant's silence like those in *DeLuna* or in *Stewart v. United States,* 366 U.S. 1, 81 S. Ct. 941, 6 L. Ed. 2d 84 (1961), were made, where the actions of counsel . . . no more than *incidentally "pointed up"* a defendant's silence, no violation of constitutional rights were found. . . . Nor do we think that the attempts to call the defendant to the stand add anything to the comments relied upon. They were not in themselves direct comments upon the defendant's failure to testify. They did *no more than momentarily illuminate the obvious fact that the defendant did not choose to testify,* and could have had no greater impact upon the jury than the direct statement by the defendant's counsel immediately thereafter that "The defendant does not take the stand. . . . He will stand mute."[256]

Furthermore, the court opined that cautionary instructions telling the jury not to draw any inference against the defendant because he failed to testify would sufficiently dissipate any prejudice defendant might otherwise have suffered.

Five years later, the Seventh Circuit again took occasion in *United States v. Blue*[257] to distinguish *DeLuna.* In *Blue,* appellant's co-defendant's counsel had commented that his client did not have to take the stand but had decided to do so in order to tell the jury everything. Appellant argued that the remark im-

252 371 F.2d 166 (7th Cir. 1966).
253 *Id.* at 170.
254 *Id.* at 171.
255 *Id.*
256 440 F.2d 300, 302-03 (7th Cir.), *cert. denied,* 404 U.S. 836 (1971).
257 308 F.2d 140, 143 (5th Cir. 1962).

planted in the minds of the jury a negative inference as to his failure to testify in his own behalf. The court, however, disagreed. In *DeLuna*, it explained, DeLuna's co-defendant had directly incriminated him. In addition, counsel for his co-defendant repeatedly contrasted his testifying client with the silent DeLuna, whereas in *Blue*, the comments were neither so extensive nor pervasive.

The second objection in regard to an antagonistic co-defendant's silence confers a claim that appellant's sixth amendment right to confrontation has been infringed if he is precluded from commenting upon a co-defendant's silence. This claim is a direct counterpart of the fifth amendment claim discussed above, since the appellants have simply exchanged roles. When claiming violation of fifth amendment rights, the appellant was the nontestifying defendant; while in the latter claim, appellant is the defendant who chose to take the stand.

In support of a motion for severance because of inability to comment, defendants may rely upon dicta expressed in *DeLuna* to the effect that the testifying defendant also may have a right to comment on a co-defendant's failure to testify, and severance is required to preserve that right, so as not to simultaneously violate the co-defendant's right not to be compelled to testify. The right to confrontation allows him to invoke every inference from his co-defendant's failure to take the stand.[258] However, it should be pointed out that this *dictum* was severely criticized by then Judge Griffin Bell in his concurring opinion in *DeLuna* on the ground that it would create an "intolerable procedural problem."[259] He argued that, if a defendant possesses the right to comment on his co-defendant's failure to testify,

> a mistrial will be required at the instance of his co-defendant who did not take the stand. In addition, severance in advance of trial may be required where there is a representation to the court that one co-defendant does not expect to take the stand while another or others do expect to testify, and claim their right to comment upon the failure of the other to testify. This would eliminate joint trials, or vest in a defendant the right to a mistrial during final arguments, or in the alternative create built-in reversible error, all in the discretion of the defendants. The law contemplates no such end.[260]

In *United States v. Kahn*,[261] the Seventh Circuit held in disrepute the *dicta* espoused by the majority in *DeLuna* and instead adopted Judge Bell's rationale. In *Kahn*, Judge Hastings explained that

> we cannot say there is an absolute right, without reference to the circumstances of defense at trial, for a defendant to comment on the refusal of a co-defendant to testify. We think there must be more to justify the disintegration of a trial. . . . There must be a showing that real prejudice will result from the defendant's inability to comment.[262]

258 *Id.* at 156.
259 *Id.*
260 381 F.2d 824 (7th Cir.), *cert. denied*, 389 U.S. 1015 (1967).
261 *Id.* at 840. *Accord* Kolod v. United States, 371 F.2d 983, 991-92 (10th Cir. 1967), where the court found that appellant could not possibly have benefitted from commenting to the jury in regard to his co-defendant's silence, since defendants were not antagonistic in that no defendant had attempted to transfer all of the blame to another.
262 *See* Note, *Joinder of Defendants in Criminal Prosecutions*, 42 N.Y.U.L. REV. 513, 526 (1967).

Thus, although the Seventh Circuit has not completely closed the door to the possibility that a defendant may be prejudiced by the inability to comment on his co-defendant's silence, it is far from clear what the court will demand as an adequate showing of prejudice or whether the court will ever in fact recognize a defendant's right to comment in a case before it. Certain, however, is that a defendant must, at the very minimum, establish that defendants' positions are extraordinarily antagonistic—that their defenses are mutually exclusive and that each defendant has no qualms about assisting in the conviction of his co-defendant in order to save himself. One commentator has suggested that the matter be resolved at a pre-trial conference in chambers so that the judge could discover which defendants intend to testify and inquire whether such a degree of antagonism exists among defendants as to give one defendant a legitimate interest in commenting on his co-defendant's silence.[263]

4. Severance to Compel Co-Defendant's Exculpatory Testimony

The fifth amendment privilege against self-incrimination prohibits a defendant from even being called to the witness stand.[264] Consequently, a defendant may be obstructed in presenting a defense when he desires to obtain favorable testimony from his co-defendant but is foreclosed from doing so when the co-defendant fails to take the stand. Yet, a court is under no automatic duty to sever merely because potentially exculpatory testimony of a co-defendant exists.[265] In order to outweigh the government's compelling goals of judicial efficiency and economy which justify joint trails, appellant must establish that he was deprived of a fundamentally fair trial because he was unable to make use of his co-defendant's testimony at trial. And "what constitutes abuse of discretion in terms of protecting each defendant's rights in such cases necessarily is determined by the facts in each specific case."[266]

United States v. Echeles[267] has been adopted as a standard for comparison by numerous courts in determining whether or not appellant was so prejudiced as to infringe upon due process protections. In *Echeles,* an attorney and his client were on trial jointly for having knowingly procured a witness to testify falsely at this client's narcotics trial. The client, after admitting in open court during his narcotics trial his part in the scheme, on three separate occasions denied Echeles' participation. At the subsequent joint perjury trial, Echeles moved for a severance on the ground that in a joint trial he would be unable to call his co-defendant to testify to the exculpatory statements. The government countered Echeles' argument by pointing out that, even if the trial were severed, there was no showing that Echeles' co-defendant would waive his fifth amendment rights if tried first. The Seventh Circuit declared, however, that the trial court could

263 United States v. Echeles, 352 F.2d 892, 897 (7th Cir. 1965).
264 Byrd v. Wainwright, 428 F.2d 1017, 1020 (5th Cir. 1970). *See also* United States v. Kahn, 381 F.2d at 841.
265 352 F.2d at 897.
266 352 F.2d 892.
267 *Id.* at 898. *See also* Byrd v. Wainwright, 428 F.2d 1017, 1022 (5th Cir. 1970) for the proposition that the sequence of trials is in the discretion of the court.

properly have directed that Echeles be tried last.[268] Moreover, it remarked:

> With regard to the question of whether or not Arrington would claim the privilege if he were called as a witness during a trial of Echeles alone—a trial held subsequent to his own—we can only say that such question was not properly the government's to interpose.[269]

The court added:

> Speculation about what Arrington might do at a later Echeles trial undoubtedly would be a matter of some concern to Echeles, but he should not be foreclosed of the possibility that Arrington would testify in his behalf merely because that eventuality was not a certainty.[270]

In holding that it was error to deny Echeles' severance motion, the court stated that "a fair trial for Echeles necessitated providing him the *opportunity* of getting the Arrington evidence before the jury, *regardless of how we might regard the credibility of that witness or the weight of his testimony.*"[271]

It is incumbent to point out that in *Echeles* the credibility of the witness' testimony was not at issue. Rather, because the co-defendant's exculpatory statements were declarations contrary to his own penal interest, they bore an exceptionally high indicia of reliability. And subsequent courts have found it quite appropriate for the court to inquire into the weight of the testimony as well as the witness' credibility. For example, in *United States v. Abraham*,[272] the Seventh Circuit, after examining the proposed exculpatory testimony, determined that it merely contradicted certain elements of the government's proof. "Unlike in *Echeles,* the testimony would not amount to a *dramatic and convincing exculpation* of the co-defendants."[273] Similarly, the Fifth Circuit charged that: "Credibility is for the jury, but the judge is not required to sever on patent fabrications. If the testimony is purely cumulative, or of negligible weight or probative value, the court is not required to sever."[274]

Moreover, subsequent courts have put great weight on the fact that the exculpatory testimony at issue had already been elicited as a declaration against penal interest. In *Byrd v. Wainwright*,[275] the court was impressed that confessions exculpatory of appellant made by his six co-defendants were all contrary to their penal interests. And in *United States v. Alejandro*,[276] the court, in rejecting appellant's claim, noted that the exculpatory material was not contrary to his co-

268 352 F.2d at 898. This phrase has been rejected by the Fifth Circuit in Byrd v. Wainwright, 428 F.2d 1017, 1022 (5th Cir. 1970), on the ground that the government is entitled to protest defendant's need for a severance. The *Byrd* view is probably the more accepted view—even in the Seventh Circuit. *Byrd* has been cited favorably by the Seventh Circuit in United States v. Isaacs, 493 F.2d 1124, 1161 (7th Cir.), *cert. denied,* 417 U.S. 976 (1974).

269 352 F.2d at 898.

270 *Id.* (emphasis added).

271 541 F.2d 1234 (7th Cir. 1976).

272 *Id.* at 1240 (emphasis added).

273 428 F.2d 1017, 1021. *See also* United States v. Bridgeman, 523 F.2d 1099, 1108 (D.C. Cir. 1975), where the court found that with or without the proposed exculpatory testimony, there was ample evidence to convict defendants.

274 428 F.2d 1017, 1021-22.

275 527 F.2d 423, 428.

276 *Id.* at 428.

defendant's penal interest, citing *Echeles* as authority. In *Alejandro,* the court pointed out that, because the co-defendant had been caught "red-handed" with the heroin, "[h]is effort to absolve his co-defendant cost him nothing. It is not unusual under such circumstances for the obviously guilty defendant to try to assume the entire guilt. Denying Alejandro the opportunity to get that kind of testimony from [his co-defendant] was not . . . depriving Alejandro of a fundamentally fair trial."[277]

The Fifth Circuit in *Byrd v. Wainwright*[278] expanded the basic guidelines set forth in *Echeles* into a five-part analysis to aid courts in their determination as to when a separate trial is mandated. Those criteria, to be used as general areas of inquiry, are set out below:

First, "[d]oes the movant intend or desire to have the co-defendant testify? How must his intent be made known to the court, and to what extent must the court be satisfied that it is bona fide?"[279] In discussing this guideline, the *Byrd* court explained that it is not essential that defendant's attorney submit formal testimony under oath or a sworn affidavit in regard to his intent to use the co-defendant's testimony. Instead, the matter may be presented orally during a conference, or as in *Byrd,* at the pre-trial suppression hearing.

Secondly,

> [w]ill the projected testimony of the co-defendant be exculpatory in nature, and how significant must the effect be? How does the defendant show the nature of the projected testimony and its significance? Must he in some way validate the proposed testimony so as to give it some stamp of verity?[280]

The requirement that the proposed testimony be exculpatory, implicit in *Echeles,* is sometimes overlooked by defendants because of its apparent simplicity. But in *United States v. Diez,*[281] because co-defendant's proffered testimony was deemed conclusive and lacking in sufficient detail, the court found it bereft of exculpatory content. Likewise, in *United States v. Bridgeman,*[282] when the tendered testimony merely asserted that appellants did not participate in planning a prison break or subsequent riot, the court explained that when defendants are charged with conspiracy, they may be held responsible for acts done in furtherance of the conspiracy before or after their actual participation. Hence, testimony to the effect that defendants were not involved in one phase of the conspiracy would not have been exculpatory. Finally, in *United States v. Cochran,*[283] the court explained that, when the object of the proposed testimony is to impeach the credibility of a government witness, the testimony is not exculpatory in nature. Thus, appellant had no right to a separate trial.

Thirdly, the Fifth Circuit says a court should consider "[t]o what extent,

277 428 F.2d 1017.
278 *Id.* at 1019.
279 *Id.* at 1020. For an illustration of the procedure which may be followed by the trial court, see United States v. Gleason, 259 F. Supp. 282 (S.D.N.Y. 1966), cited favorably by the *Byrd* court.
280 515 F.2d 892, 902-03 (5th Cir. 1975).
281 523 F.2d 1099, 1108 (D.C. Cir. 1975).
282 499 F.2d 380, 391 (5th Cir. 1974), *cert. denied,* 419 U.S. 1124 (1975).
283 428 F.2d at 1020.

and in what manner, must it be shown that if severance is granted there is a likelihood that the co-defendant will testify?"[284] This standard of likelihood was initially set out in *Echeles* and interpreted by subsequent courts as imposing a burden upon the defendant to demonstrate that the co-defendant would more likely than not testify at a separate trial. Ensuing cases have not been prone to find the burden satisfied. In *Alejandro,* for instance, the appellant failed to establish that the co-defendant would be willing to testify at a separate trial. In *United States v. Kahn,*[285] Judge Hastings added that "[t]he unsupported possibility that such testimony might be forthcoming does not make the denial of a motion for severance erroneous." Therefore, it is imperative that a defendant demonstrate that his/her co-defendant is willing to offer testimony to his/her benefit. In *United States v. Isaacs,*[286] appellant's claim of prejudice was rejected when his counsel had simply made an oral statement to the court that appellant's co-defendant would render exculpatory testimony. The court explained that severance was not required "where the possibility of the co-defendant's testifying is merely colorable or there is no showing that it is anything more than a gleam of possibility in the defendant's eye."[287]

In *United States v. Johnson,*[288] appellant's counsel had merely claimed, to no avail, that the co-defendant's testimony could have explained his client's presence at the scene of the attempted robbery, but failed to establish that the co-defendant was actually willing to so testify. A similar ruling is found in *Kolod v. United States.*[289] There, the co-defendant had submitted an affidavit stating that he was willing to testify and describing the nature of his testimony, but adding that after rendering the exculpatory testimony, he would be compelled to assert the fifth amendment as to his own case, thus impairing his defense in the eyes of the jury. On appeal, the Tenth Circuit affirmed the trial court's denial of severance on the ground that the appellant did not establish that the witness would be more willing to waive his fifth amendment privilege if separate trials were granted, and it was not up to the court to so speculate.[290] And in *Braasch v. United States,*[291] appellant claimed his co-defendant's testimony could have exonerated him. However, during in-chambers questioning by the trial judge, the co-defendant refused to answer any questions, including whether he would testify for Braasch in a separate trial if one were granted. Thus, appellant failed to meet his burden.

In addition to the aforementioned requirements, the co-defendant's offer to testify must not be made conditional upon some event. For example, in *United States v. Cochran,*[292] when the witness agreed to testify only if the charges against

284 381 F.2d 824, 841 (7th Cir.), *cert. denied,* 389 U.S. 1015 (1967).
285 493 F.2d 1124, 1160 (7th Cir.), *cert. denied,* 417 U.S. 976 (1974).
286 *Id.* at 1161 (quoting Byrd v. Wainwright, 428 F.2d at 1022).
287 426 F.2d 1112, 1116 (7th Cir.), *cert. denied,* 400 U.S. 842 (1970).
288 371 F.2d 983 (10th Cir. 1967).
289 *Id.* at 991. *See also* Woodcock v. Amaral, 511 F.2d 985, 994, n.18 (1st Cir. 1974), where appellant offered no indication that his co-defendant would have been more willing to waive his fifth amendment right in a separate trial.
290 505 F.2d 139, 150 (7th Cir. 1974), *cert. denied,* 421 U.S. 910 (1975).
291 499 F.2d 380, 392-93 (5th Cir. 1974), *cert. denied,* 419 U.S. 1124 (1975).
292 515 F.2d 892 (5th Cir. 1975).

him were dismissed, the appellate court found the severance motion properly denied.

Finally, some courts are not even satisfied if there exists a non-conditional, likelihood that the co-defendant will testify. In *United States v. Diez,*[293] the Fifth Circuit, relying on its own criteria as enunciated in *Byrd* increased defendant's burden by adding that "[t]he movant must show a *substantial likelihood* that the co-defendant will testify if the severance is granted."[294] Such an increased burden of proof will not affect cases like *Byrd,* where it was certain that the exculpatory evidence would have been introduced at a separate trial. However, in most cases, defendants find it difficult even to meet the simple likelihood test.

The fourth criterion the court should weigh, according to the Fifth Circuit, is "the demands of effective judicial administration and economy of judicial effort. Related to this is the matter of timeliness in raising the question of severance."[295]

Finally, the *Byrd* court took into account the question of "how great is the probability that a co-defendant will plead guilty at or immediately before trial and thereby prejudice the defendant, either by cross-defendant prejudice or by surprise as it relates to trial preparation."[296]

Even after considering the guidelines set forth in *Byrd,* it is nevertheless unlikely that an appellate court will find that a trial court abused its discretion in failing to grant a severance. In the two leading cases in which abuse of discretion was determined, the facts were extraordinary, and prejudice was obvious. In *Echeles,* appellant's co-defendant had completely exonerated him three times previously in open court. The prejudice which inhered to the appellant was even more egregious in *Byrd v. Wainwright.*[297]

Byrd was one of seven defendants indicted for the rape of a young woman. All six of his co-defendants had confessed their part in the crime. Four of the confessions failed to mention Byrd and the fifth explicitly exonerated Byrd. Although the sixth confession implicated Byrd as being present during the rape, the confessor later admitted to Byrd's counsel that he had been confused and mistaken, since Byrd clearly was not involved. Byrd was the only defendant who did not confess. Moreover, he was the only defendant to take the stand in his own behalf at trial. Because Byrd was jointly tried with his six co-defendants, he was precluded from introducing the six confessions into evidence, since each was *Miranda*-defective. The appellate court pointed out that, in a separate trial, even if his co-defendants refused to testify in Byrd's behalf, Byrd could certainly take advantage of the exculpatory content of the confessions, since they would not

293 *Id.* at 903 (emphasis added).
294 428 F.2d at 1020. *See, e.g.,* United States v. Diez, 515 F.2d 892, 903 (5th Cir. 1975), where defendant's motion for severance three weeks into trial with no explanation for the delay was deemed untimely.
295 428 F.2d at 1020.
296 428 F.2d 1017.
297 Because *Byrd* involved the review of a habeas corpus petition, the appellate court looked to state evidence law regarding hearsay. Under the federal rules, however, declarations against penal interests are defined as non-hearsay and are equally admissible.

be used for incrimination purposes at Byrd's individual trial and since they fit within a hearsay exception.[298]

In sum, unless an appellant can demonstrate an inordinate degree of prejudice resulting from an inability to utilize a co-defendant's exculpatory testimony because of the co-defendant's exercise of his fifth amendment right to remain silent at a joint trial, plus establish that the co-defendant will be more willing to waive that privilege at a separate trial (or that the testimony would be admissible at a separate trial), the court is under no duty to sever the defendants.

5. Severance to Exclude Co-Defendant's Out-of-Court Inculpatory Statements

The antithesis of defendant's request for severance so that he may obtain exculpatory evidence from a co-defendant is the situation where a defendant desires a severance so as to exclude inculpatory testimony based on an extrajudicial confession of a co-defendant. *Bruton v. United States*[299] is the landmark case in this area. *Bruton* is concerned with the prejudicial impact on a defendant, when an out-of-court confession incriminatory as to both defendants is made by a co-defendant and related in court bya third-party witness. The constitutional infirmity in these cases arises from defendant's inability to cross-examine the declarant (the confessing co-defendant), when he invokes his fifth amendment right to refuse to take the stand. As a result, defendant is deprived of his sixth amendment right to confront his accusers. The mere fact that a defendant has the opportunity to cross-examine the witness to whom the confession was made is ineffective to bolster the innate unreliability of the hearsay statement.

In such instances, the confession is properly admissible against the confessing declarant under state and federal evidentiary law as an admission against penal interest—an exception to the hearsay doctrine grounded in notions that statements falling within certain delineated areas have a high indicia of reliability. However, it is patently inadmissible when considered as evidence regarding the non-confessing defendant; since, as to him, the statement does not fit within one of the hearsay exceptions tending to make it reliable.

Prior to *Bruton,* courts simply instructed juries to limit the testimony to the declarant/confessor and to ignore all implications as to the non-confessor. Not until *Bruton* did courts recognize the impossibility of such a feat. In such circumstances, even the most precise limiting instructions are insufficient to undo the prejudice a defendant suffers in the minds of the jurors.

The Seventh Circuit recognized this potential for prejudice in *Simmons v. United States,*[300] where an extrajudicial incriminatory statement of appellant's co-defendant had been introduced as part of the government's case in chief. At the close of the government's case, the co-defendant pleaded guilty, thereby cutting off any opportunity of appellant to subject him to cross-examination. The court held that it was incumbent on the government to produce the declarant, and the fact that appellant could have subpoenaed him was irrelevant.

298 391 U.S. 123 (1968).
299 440 F.2d 890 (7th Cir. 1971).
300 *Id.* at 891. *See also* United States v. Cook, 530 F.2d 145, 149-51 (7th Cir.), *cert. denied,* 426 U.S. 909 (1976), finding admission of evidence in contravention of *Bruton* extremely prejudicial.

In determining that appellant was prejudiced by the unavailability of the declarant, the court relied on *Bruton,* stating that "the risk that the jury will not, or cannot, follow [cautionary] instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."[301]

However, a prerequisite for the applicability of *Bruton* is that the extra-judicial statements must, in fact, be inculpatory as to the non-confessing defendant. In *United States v. Hicks,*[302] four defendants were tried jointly and the out-of-court confession of one of the defendants made a reference to dividing the stolen money four ways. The court, concluding that a reference to the number of persons involved in a bank robbery was not inculpatory to the non-confessing defendants, rejected their claims of prejudice which had been raised pursuant to Rule 14.[303]

When the potential for a *Bruton*-type dilemma exists, there are three options available to the court and the prosecutor: 1) not to make use of the incriminating confession; 2) to order separate trials of the defendants; or 3) simply to delete all references to the non-confessing defendant.[304]

The choice most frequently invoked is that of redaction, where the court edits out of the confession all incriminating references to the joint defendant. Authority for this practice is attributed to a footnote in *Bruton v. United States,* validating the use of deletions as a method to simultaneously protect a non-confessing defendant's sixth amendment right while furthering the government's interest in trying defendants together. Thus, in *United States v. English,*[305] when an F.B.I. agent related a defendant's confession, stating that the confessing defendant and "two other individuals" had committed the crimes, the court found that the non-confessing defendants' sixth amendment rights remained intact.[306]

The applicability of *Bruton v. United States*[307] was severely curtailed by

301 524 F.2d 1001 (5th Cir. 1975), *cert. denied,* 424 U.S. 946; 425 U.S. 953 (1976).

302 *Id.* at 1002-03. *See also* United States v. Bastone, 526 F.2d 971, 983 (7th Cir. 1975); United States v. Blassick, 422 F.2d 652, 655 (7th Cir. 1970), *cert. denied,* 402 U.S. 985 (1971); United States v. Johnson, 426 F.2d 1112, 1116 (7th Cir.), *cert. denied,* 400 U.S. 842 (1970). *Cf.* United States v. Kahn, 381 F.2d 824, 837 (7th Cir.), *cert. denied,* 389 U.S. 1015 (1967) (a guilty plea entered by one co-defendant after trial had commenced was not the equivalent of an out-of-court confession within the meaning of *Bruton*).

303 *See* United States v. Truslow, 530 F.2d 257, 261-62 (4th Cir. 1975). It is important to note, however, that if the government chooses not to sever, but agrees not to introduce *Bruton*-defective evidence and thereafter breaks its promise, defendant's conviction will be reversed. United States v. Taylor, 508 F.2d 761, 764-65 (5th Cir. 1975).

Also noteworthy is the fact that, if after trial commences against joint defendants, the government obtains a severance and a mistrial to avoid *Bruton* problems, the double jeopardy clause attaches. In United States v. Glover, 506 F.2d 291 (2d Cir. 1974), four days into the trial, after it became clear that the case presented a *Bruton* dilemma, the court granted the government's motion for severance and a mistrial. Glover's conviction on retrial was reversed on the ground that he had twice been placed in jeopardy.

304 501 F.2d 1254 (7th Cir. 1974), *cert. denied, sub nom.,* Hubbard v. United States, 419 U.S. 1114 (1975).

305 *Id. See also* United States v. Fleming, 504 F.2d 1045, 1049 (7th Cir. 1974); United States ex rel. Long v. Pate, 418 F.2d 1028, 1030 (7th Cir. 1970), *cert. denied,* 398 U.S. 952; United States v. Gregg, 414 F.2d 943, 948-49 (7th Cir. 1969), *cert. denied,* 399 U.S. 934 (1970); United States v. Dady, 536 F.2d 675, 677-78 (6th Cir. 1976); (all relying on *Bruton* as justification for the use of redaction).

306 391 U.S. 123 (1968).

307 400 U.S. 74 (1970).

Dutton v. Evans.[308] In *Dutton,* a co-conspirator's out-of-court statement was admitted in evidence against the defendant under the conspiracy exception to the hearsay rule. The Supreme Court in *Dutton* distinguished *Bruton* and limited it only to those cases where the extra-judicial incriminatory confession did not fit within any exception to the hearsay rule as to the non-confessor. The Court made clear in *Dutton* that "[t]he right of cross-examination . . . is not absolute. There is no violation of sixth amendment rights where the testimony is sufficiently clothed with 'indicia' of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation with the declarant."[309]

Since both state and federal evidence law exceptions to the hearsay doctrine are codifications of the common law determinations as to which classifications of evidence are reliable regardless of inability to cross-examine the declarant, statements fitting within those exceptions pose no sixth amendment difficulties. Consequently, in such cases, severance is never required.

The most common exception to the hearsay rule which is utilized to introduce out-of-court statements into evidence is the co-conspirator exception. Statements made by a conspirator in furtherance of the conspiracy are admissible as to all conspirators regardless of whether or not the opportunity for cross-examination exists.[310] However, a limitation to the co-conspirator exception was articulated by the Supreme Court in *Anderson v. United States.*[311]

> The doctrine that declarations of one conspirator may be used against another conspirator, if the declaration was made during the course of and in furtherance of the conspiracy charged, is a well recognized exception to the hearsay rule which would otherwise bar the introduction of such out-of-court declarations. . . . The hearsay-conspiracy exception applies only to declarations made while the conspiracy charged was still in progress, a limitation that this Court has "scrupulously observed."

As a result of that limitation, the Seventh Circuit reversed appellant's conviction in *United States v. Lyon*[312] on the ground that the introduction of a co-defendant's post-conspiracy extrajudicial statements implicating Lyon violated Lyon's sixth amendment right of confrontation, and that violation could not be cured by limiting instructions to the jury.

Other exceptions to the hearsay rule are also deemed reliable and thus hearsay testimony fitting within those exceptions is admissible without an opportunity for cross-examination of the declarant. For example, in *McLaughlin v. Vinzant,*[313] testimony of a co-defendant's spontaneous utterance that "George

308 United States v. Cogwell, 486 F.2d 823, 834 (7th Cir. 1973), *cert. denied,* 416 U.S. 959 (1974) (citing Dutton v. Evans, 400 U.S. 74, 89 (1970)).

309 *See* FED. R. EVID. 801 (d)(2)(E) (1975).

As illustrative of the co-conspirator's exception to the hearsay rule, *see* Dutton v. Evans, 400 U.S. 74 (1970); United States v. Cogwell, 486 F.2d 823, 834-35 (7th Cir. 1973), *cert. denied,* 416 U.S. 959 (1974); United States v. Jones, 438 F.2d 461, 466 (7th Cir. 1971); United States v. Kelley, 526 F.2d 615, 620-21 (8th Cir. 1975), *cert. denied,* 424 U.S. 971 (1976); United States v. Swainson, 548 F.2d 657, 661 (6th Cir. 1977).

310 417 U.S. 211, 218 (1974), *cited in* United States v. Truslow, 530 F.2d 257, 260 (4th Cir. 1975).

311 397 F.2d 505 (7th Cir.), *cert. denied,* 393 U.S. 846 (1968).

312 522 F.2d 448 (1st. Cir.), *cert. denied,* 423 U.S. 1037 (1975).

313 402 U.S. 622 (1971).

shot someone" was found admissible against George despite the fact that the uttering co-defendant failed to take the stand.

Bruton was also distinguished by the Supreme Court in *Nelson v. O'Neil.*[314] Since *Bruton*'s rationale was based on infringement of the non-confessing defendant's right to confrontation, the Supreme Court reasoned in *Nelson* that if an opportunity for cross-examination were available, defendant's constitutional right would not be impinged. As a result, whenever the confessing co-defendant takes the stand, whether he confirms or denies the out-of-court statement attributed to him, *Bruton* is inapplicable, and *Nelson v. O'Neil* controls. In such a case, severance is not required, as the defendant's constitutional rights, according to the Court, are not in danger of being abrogated. Hence, in *United States v. Marine,*[315] the Seventh Circuit affirmed the district court's denial of severance on the ground that the declarant testified and was subjected to cross-examination by appellant in regard to the out-of-court statements incriminating him.

However, there have been a few cases where an appellate court has found that a trial court abused its discretion in failing to order severance, despite the fact that the confessing co-defendant was available to be cross-examined. For example, in *Schaffer v. United States,*[316] the Fifth Circuit reversed when

> the two defendants were so inseparably connected that the jury could hardly have been expected to return a verdict of guilty against one and of not guilty as to the other. There being only two defendants, it would not be very time consuming but entirely practicable to accord them separate trials. . . . "We doubt if it was within the realm of possibility for this jury to limit its consideration of the damaging effect of such statements merely to the defendant against whom they were admitted."

Although *Schaffer* was decided prior to *Nelson v. O'Neil* which expressly condoned joint trials in which the confessing co-defendant was subject to cross-examination, *Schaffer* was reaffirmed in a post-*Nelson* case by the Fifth Circuit in *United States v. Johnson.*[317]

Additionally, the Seventh Circuit found occasion to reverse a conviction, even though the confessing co-defendant was available for cross-examination but the appellant did not avail himself of the opportunity to do so. In *United States v. Guajardo-Melendez*[318] the court was disturbed by the government's bad motive in adducing the incriminating testimony, as well as the fact that other evidence against appellant was insubstantial. Judge Swygert, concluding that defendant was denied a fair trial by the admission of the hearsay testimony, explained that:

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314 413 F.2d 214 (7th Cir. 1969), *cert. denied,* 396 U.S. 1001 (1970).

315 *See also* United States v. Bastone, 526 F.2d 971 (7th Cir. 1975); United States ex rel. Long v. Pate, 418 F.2d 1028 (7th Cir.), *cert. denied,* 398 U.S. 952 (1970).

316 221 F.2d 17, 19 (5th Cir. 1955) (quoting U.S. v. Haupt, 136 F.2d 661, 672 (1943)).

317 478 F.2d 1129 (5th Cir. 1973). In *Johnson,* the confessing co-defendant took the stand and affirmed the out-of-court statement incriminating Johnson and was subjected to cross-examination. However, it is incumbent to point out that reversal in *Johnson* was based not only on the prejudice defendant suffered from his co-defendant's out-of-court testimony, but additionally on their extreme antagonistic positions at trial.

318 401 F.2d 35 (7th Cir. 1968).

> [T]he record leads us to believe that the Assistant United States Attorney should have known that the answer by Agent Azzam to his question could serve only an improper purpose—eliciting evidence which incriminated [appellant] but which was inadmissible against him. The district judge's "warning" to the jury . . . was no warning at all, and his other cautionary instructions lacked sufficient specificity to cure the prejudicial effect of the testimony, even assuming, contrary to *Bruton,* that the jury could have followed more specific instructions.[319]

Finally, even where *Bruton* has been clearly violated, the harmless error doctrine has been held applicable when "[t]he testimony erroneously admitted was merely cumulative of other overwhelming and largely uncontroverted evidence properly before the jury."[320]

C. *Prejudice Cured by Jurors' Discrimination*

In some cases, even though an appellate court recognized the potential for substantial prejudice, it nevertheless held that the defendant suffered no prejudice. The rationale in such cases rests upon two grounds. First, if it finds that the jury was carefully admonished as to the admissibility of evidence in regard to each count or each defendant to whom it related, the appellate court will presume that the jury was able to and did faithfully follow the instructions.[321] Thus, careful limiting and cautionary instructions may prevent prejudice which might otherwise occur.

There are, of course, limitations as to the ability of instructions to cure prejudice. For example, in *Bruton*[322] the Supreme Court found it beyond the capacity of the jury to compartmentalize evidence regardless of the precision of the instructions, in situations where an out-of-court confession by a co-defendant incriminated appellant, yet denied him the opportunity to cross-examine the declarant. However, subsequent courts have refused to extend limitations on the jury's ability to follow instructions to related areas.[323]

Secondly, if the jury convicted as to some counts or defendants, yet not as to others, an appellate court may infer that the evidence did not have a cumulative effect on the jury[324] and "that the jury carefully examined each count as to each defendant and rendered its verdict accordingly."[325] Thus, in *United States v. Braasch,*[326] the appellate court explained that "[t]he fact that the jury found four of the defendants not guilty on [some] counts showed that they not only knew what they were doing but did what they intended."[327]

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319 *Id.* at 39.
320 Brown v. United States, 411 U.S. 223, 231 (1973).
321 Brandom v. United States, 431 F.2d 1391, 1396 (7th Cir. 1970).
322 391 U.S. 123 (1968).
323 *See, e.g.,* Woodcock v. Amaral, 511 F.2d 985, 995 (1st Cir. 1974).
324 United States v. Lewis, 547 F.2d 1030, 1033 (8th Cir. 1976).
325 United States v. Hutul, 416 F.2d 607, 620 (7th Cir. 1969), *cert. denied, sub nom.,* Sacks v. United States, 396 U.S. 1007 (1970).
326 505 F.2d 139 (7th Cir. 1974), *cert. denied,* 421 U.S. 910 (1975).
327 *Id.* at 150. *See also* United States v. Johnston, 547 F.2d 282 (5th Cir. 1977); Dunaway v. United States, 205 F.2d 23 (D.C. Cir. 1953). *But see* Cross v. United States, 335 F.2d 987, 991 (D.C. Cir. 1964) (*Dunaway* distinguished).

D. *Rule 14 Waiver*

The motion alleging prejudice under Rule 14 should be made at the first opportunity after information in support of the motion comes to the attention of the defendant. Frequently, that time will be prior to trial. Failure to make a timely motion for severance pursuant to Rule 14 when the opportunity to do so existed prior to trial might constitute waiver of the objection. Otherwise, the motion should be made as soon as the possibility for prejudice appears.

The defendant in *United States v. Larson*,[328] for example, failed to raise his objection to joinder until his motion for a new trial. The court stated that, as a result, "the burden is on [defendant] to demonstrate actual prejudice resulting from the failure to sever. . . ."[329] to require reversal of his conviction. On the other hand, in *United States v. Sanchez*,[330] appellant did not even raise the matter of prejudice until appeal. Yet, the Ninth Circuit, although agreeing that failure to object to joinder normally constitutes waiver, observed that "with a thin case against him, we think appellant was deprived not only of his right to confrontation but of his basic right to a fair trial. This was a manifest injustice and constitutes plain error under Rule 52(b), Federal Rules of Criminal Procedure."[331]

Appellant's objection in *United States ex rel. Long v. Pate*,[332] however, was found untimely and thereby waived. Appellant claimed prejudice resulted because of his co-defendant's statements incriminating him. But the court rejected his claim on appeal on the basis that he "did not move for a severance in the trial court, despite the fact that he was informed prior to trial of the existence of his [co-defendant's incriminating] statements."[333] Likewise, in *United States v. Diez*,[334] the Court of Appeals looked harshly upon defendant's belated motion when he offered no explanation for the delay, pointing out that "[h]aving spent three weeks of trial time hearing the testimony of over sixty witnesses and considering over three hundred documents, the trial judge was not obliged to treat [defendant's] motion as he would an ordinary severance request made at the outset of trial."[335]

In addition, the objection must ordinarily be preserved for appeal through renewal in the form of a motion for a new trial.[336] Nevertheless, some courts will

328 526 F.2d 256 (5th Cir. 1976).
329 *Id.* at 259.
330 532 F.2d 155 (9th Cir. 1976).
331 *Id.* at 158.
332 418 F.2d 1028 (7th Cir.), *cert. denied,* 398 U.S. 952 (1970).
333 *Id.* at 1030. Furthermore, although *Bruton* was not controlling since in *Pate,* defendant had the opportunity to cross-examine his confessing co-defendant, the court took pains to distinguish *Bruton* on the ground that in *Bruton,* a severance had been requested by defendant and denied.
334 515 F.2d 892 (5th Cir. 1975).
335 *Id.* at 903. *See also* United States v. Caldwell, 543 F.2d 1333, 1358 (D.C. Cir. 1975) (*reh. denied* 1976), where the court considered and rejected appellant's claim of prejudice but empasized that the motion (made at midtrial) was untimely. *Accord* Kolod v. United States, 371 F.2d 983 (10th Cir. 1967), in which case the court, although rejecting appellant's claims on the merits, gave great weight to the fact that the motion for severance was untimely filed.
336 United States v. Barney, 371 F.2d 166, 170 (7th Cir. 1966); United States v. Johnson, 540 F.2d 954, 959 (8th Cir. 1976); United States v. Lewis, 547 F.2d 1030 (8th Cir. 1976); and United States v. Verdoorn, 528 F.2d 103 (8th Cir. 1976).

review the appellant's claim regardless. For example, in *United States v. Lewis,*[337] the court reviewed and rejected appellant's claim under the plain error doctrine of Rule 52(b); and in *United States v. Barney,*[338] Judge Swygert considered the appellant's claim of prejudice despite his failure to request a new trial, but found no actual prejudice.

In contrast stands *United States v. Johnson,*[339] in which the Eighth Circuit refused even to consider appellant's claim of prejudice because "the motions for separate trials were not renewed at the close of the government's case or prior to the final submission of the case to the jury; neither defendant moved for a mistrial. . . . Such being the case we conclude that in any event the pretrial demands for separate trials were effectively waived."[340]

However, it is important to note that, if the pretrial motion is not renewed at trial, the reviewing court may only look to the facts which were before the trial judge when he ruled on the pretrial motion.[341]

IV. Rule 13—Consolidation

Rule 13 provides:

> The Court may order two or more indictments or informations or both to be tried together if the offenses, and the indictments if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.

If the prosecutor or grand jury has failed to join offenses or defendants for trial when such would have been possible, the court may enter an order consolidating the offenses or defendants for trial purposes. A consolidation order may be entered upon the court's own motion or pursuant to a prosecution or defense motion. However, before ordering consolidation, the trial judge must overcome three obstacles. First, he must ensure that the offenses of defendants charged in the respective instruments could have been joined in a single indictment. Secondly, he must be satisfied that the joinder meets the requirements set out in Rule 8. If offenses are being considered for consolidation, they must satisfy Rule 8(a). If consolidation of defendants is involved, Rule 8(b) must be met. Thirdly, the trial judge must satisfy himself that the defendant or defendants will not be prejudiced within the meaning of Rule 14 by the joinder.[342]

Thus, in *United States v. McDaniel,*[343] consolidation was upheld since the consolidated defendants fulfilled Rule 8(b)'s tests. On the other hand, in *United States v. Whitehead,*[344] consolidation was found to have constituted a clear abuse of discretion, when the joinder failed to meet Rule 8(b)'s requirements.

337 547 F.2d 1030 (8th Cir. 1976).
338 371 F.2d 166 (7th Cir. 1966). *See also* United States v. Verdoorn, 528 F.2d 103 (8th Cir. 1976).
339 540 F.2d 954 (8th Cir. 1976).
340 *Id.* at 959.
341 United States v. Rogers, 475 F.2d 821 (7th Cir. 1973) (relying on United States v. Haupt, 136 F.2d 661, 673 (7th Cir. 1943)).
342 United States v. Park, 531 F.2d 754, 760 (5th Cir. 1976).
343 538 F.2d 408 (D.C. Cir. 1976).
344 539 F.2d 1023 (4th Cir. 1976).

The decision to consolidate either offenses or defendants lies within the sound discretion of the trial court.[345] Refusal to consolidate separate indictments is properly within the discretion of the trial court. Yet, if the consolidation results in misjoinder under Rule 8, a question of law completely reviewable on appeal is raised.[346]

In determining whether or not consolidation is permissible, the court must look not only to Rules 8 and 14 to ascertain whether their joinder provisions were met, but also to the decisions pursuant to those rules which have interpreted them.

If multiple indictments are consolidated, the legal effect is that the separate indictments become separate counts in one indictment.[347]

V. Conclusion

Since what many attribute to be the first recorded instance of criminal-type wrongdoing—the episode which resulted in the simultaneous condemnation and banishment from the Garden of Eden of Adam and Eve—joinder of offenses and wrongdoers for "prosecution" purposes has been a traditionally accepted notion. In this nation, which affords various procedural protections to defendants charged with crime, the practice of joinder has come to be a complex matter in many instances. There exists a virtual myriad of subtleties and nuances of various sorts with which lawyers practicing in federal court must be familiar. While the Federal Rules of Criminal Procedure provide some guidance in this area, judicial opinion has become the focal point in understanding this subject. Hopefully, these various considerations have been properly joined in this study so as to provide a useful tool to lawyers before the federal bench.

345 United States v. Mack, 249 F.2d 321, 326 (7th Cir. 1957), *cert. denied,* 356 U.S. 920 (1958).
346 531 F.2d at 754, 760.
347 205 F.2d at 23, 24.